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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-5082

UNITED STATES OF AMERICA, ex. rel.
MANUEL A. GONZALEZ,

Petitioner,

—against—

JOHN ZELKER, as Warden of Green Haven Prison at Stormville, New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM CAHN
District Attorney, Nassau County
Attorney for Respondent
County Court House
Mineola, New York 11501

HENRY P. DEVINE
JULES E. ORENSTEIN
Assistant District Attorneys
of Counsel.

PETITION NOT PRINTED

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Manuel A. Gonzalez, prays that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeals for the Second Circuit entered April 17, 1973, which reversed an order of the United States District Court for the Southern District of New York which had granted petitioner's application after a hearing for a post-conviction writ of habeas corpus pursuant to 28 U.S.C. § 2241, which writ of habeas corpus in effect set aside a New York State judgment of conviction for the crimes of Robbery, First Degree, Grand Larceny,

First Degree, Assault Second Degree, and Assault Third Degree, theretofore reviewed by the Court of Appeals of the State of New York and by the Supreme Court of the State of New York, Appellate Division, Second Department, and also by this Honorable Court, which denied certiorari on January 11, 1971 (400 U.S. 996).

Opinions Below

The opinion of the United States Court of Appeals below is not officially reported yet and is annexed hereto as Appendix A.

The report of Magistrate Goettel dated September 24, 1971, recommending the holding of an evidentiary hearing, is annexed hereto as Appendix B.

Said Magistrate's report and recommendation dated May 17, 1972 is annexed hereto as Appendix C.

The order of United States District Court Judge Irving Ben Cooper dated June 19, 1972, confirming the Magistrate's report, is annexed hereto as Appendix D.

The Court of Appeals of the State of New York, by a four to two vote, officially reported at 27 N.Y. 2d 53, affirmed an order of the Supreme Court of the State of New York, Appellate Division, Second Department, which affirmed without opinion (31 App. Div. 2d 1006) a judgment of conviction following a jury trial in the Nassau County Court rendered on September 22, 1967, wherein petitioner was sentenced to terms of ten to twenty years for Robbery, First Degree, five to ten years for Grand Larceny, First Degree, two and one-half to five years for Assault, Second Degree, and suspended sentence on Assault, Third Degree, all sentences to run concurrently.

Jurisdiction

The jurisdiction of this Court is apparently based upon 28 U.S.C. § 1254 (1), it being argued that there exists a conflict between the Circuit Courts as to the standard to be applied under *Simmons* v. *United States*, 390 U.S. 377, and it being further argued that petitioner was deprived of due process of law (presumably under the Fifth and Fourteenth Amendments to the United States Constitution) by an in-court identification claimed unreliable under the totality of the circumstances.

Constitutional Provisions Involved

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny

to any person within its jurisdiction the equal protection of the laws.

Prior Proceedings

New York State Proceedings

As can be gleaned from the foregoing and the annexed appendices, the petitioner was convicted in the Nassau County Court after a jury trial on September 22, 1967 of Robbery, First Degree, Grand Larceny, First Degree, Assault in the Second and Third Degrees, receiving the aforesaid sentences therefor. The judgment of conviction was unanimously affirmed without opinion by the Appellate Division, Second Judicial Department, *supra*, and on July 1, 1970 the New York State Court of Appeals, *supra*, affirmed the conviction by a vote of four to two. A previous petition for a writ of certiorari was denied by this Court, *supra*, on January 11, 1971.

Federal Proceedings

By order to show cause dated April 6, 1971 Judge Cooper directed respondent to show cause why a writ of habeas corpus pursuant to 28 U.S.C. § 2243 should not be issued. The matter was referred to a Magistrate of the United States District Court for the Southern District of New York on June 22, 1971 for report and recommendation.

By report dated September 24, 1971, *supra* (Appendix B), Magistrate Goettel recommended an evidentiary hearing be held, which hearing was conducted by said Magistrate commencing February 3, 1972.

Because Mrs. Marguerite D'Amora, an identifying witness at the State trial, had retired for reasons of health and had moved to the State of Virginia, she was unable to

attend the hearing, and it was therefore necessary to obtain her deposition upon written interrogatories. Said interrogatories were returned to the Magistrate during the month of May, 1972. Annexed hereto as Appendix E is a copy of Court Exhibit 2, the papers regarding the deposition of Mrs. Marguerite D'Amora.

By report and recommendation dated May 17, 1972 Magistrate Goettel recommended the issuance of a writ of habeas corpus and on June 19, 1972 Judge Cooper confirmed and adopted the Magistrate's report, *supra* (Appendix D).

On July 6, 1972 an order was signed directing respondent to release the relator unless the respondent re-tried him within sixty days, which order was filed in the United States District Court, *supra*, on July 7, 1972.

On July 24, 1972 a notice of appeal from Judge Cooper's aforesaid order was filed by respondent in the United States District Court for the Southern District of New York, and the certified record of the proceedings before the District Court was filed with the United States Court of Appeals on August 29, 1972. The appeal was argued January 31, 1973 and by opinion decided April 17, 1973 (Appendix A), the order of the United States District Court (Cooper, J.) was reversed.

Background and Statement of Facts

On March 18, 1966 two men committed an armed robbery at the State Laundry in the village of Hempstead, Nassau County, New York. Subsequent to that time the petitioner herein and one James F. Castellano were indicted for that and related crimes.

The evidence generally adduced at the trial held in the County Court of Nassau County was analyzed in detail in the brief submitted on behalf of respondent to the Appellate

Division, Second Department, and the page references therein which follow refer to page numbers of the transcript of trial minutes.

THE STATE TRIAL

Marguerite D'Amora testified for the People that she was working as a switchboard operator at the State Laundry, Hempstead, N. Y. on March 18, 1966, when at about 1:10 P.M., a new blue, very shiny car, attracted her attention (332, 333, 336, 337) as it pulled up across the street with two men in it. It made a U-turn and parked near the front door of the office (337). Both men got out of the car and entered her office in a hurry (339) at about 12 feet from her position and she could clearly see their faces (340). She identified the two men in Court, Gonzalez and Castellano, as the same men who entered the office on March 18, 1966 (340-341). She spoke to Gonzalez [to ask if she could help him] as he passed the counter while Castellano remained at the door (342). Gonzalez turned and looked about into the other room and then walked up to her about 1 foot away (342-343), and she saw Gonzalez had a gun in his hand pointed at her, and he said to her, "This is a stick-up, come with me" (344) and "You won't get hurt" (358).

Simultaneously, Castellano said, "Get up" and they escorted her into the hallway at the foot of the stairs (344). Then Gonzalez went back into the next room and escorted another employee, Kitty Clarke, out of the office into the hallway. Castellano was also armed with a gun but it was in his right hip pocket (345).

Gonzalez put a mask on his face (346, 382, 394) and told her, "Show me to the cashier's office" (346, 348). As they walked up the stairs, one of the men followed behind her and one followed Kitty Clarke (346). One

man interrupted a third employee making a telephone call in a booth by removing the receiver from the girl's hand and hanging it up, and took her along with them into the upstairs office (347). As they approached the cashier's office, Mrs. Clapp walked out and inquired, "What is the joke?" The men said something but she didn't remember the words they spoke and Gonzalez went into the cashier's office (349) while Castellano removed another employee from the adjoining office (350), and the employees were rounded up into one room except for the cashier, Mrs. Clapp (351-352), and she heard Gonzalez say to someone in the cashier's office, "Hurry up" (356), and both men then left with one of the men carrying a brief case (356).

The men left, there was a scene of confusion, but the police arrived and she spoke to them (358, 359).

On cross-examination, Mrs. D'Amora testified that she was employed for 14 years at the State Laundry and resided in Lindenhurst for 12 years (365). She gave a description of Gonzalez as the taller man and that he was armed and he put on a mask (371, 382-383), and she described the shorter man (375) as having a heavy beard with a gun in his pocket (376, 377) and piercing eyes (378) and how they affected her (389) at the time. She learned after the robbery that Gonzalez was a former employee but she didn't remember ever seeing him (392).

She testified that she saw defendants at the robbery and thereafter just prior to trial in the courthouse (429-432) and that she was very upset and frightened by the robbery and had required medical attention, and incurred expenses (447-451).

Katherine Clarke testified that she had been employed 15 years by State Laundry and was working downstairs on March 18, 1966 (451, 452) in the early afternoon when she noticed a man going by the switchboard and he re-

turned accompanied by "Peggy" D'Amora, when she asked, "Peggy, where are you going?" as Peggy and the man were going toward the stairs (455). Peggy was in front, followed by the man. The man said, "You come too" (456) and she went along with them to the stairway and realized something was wrong (457). Although the man was near her, she didn't see him clearly (456) even though she followed him up the stairs, at which time she saw the second man, dressed in black with a heavy black beard (457, 461). She didn't see any weapon but felt a hard object pressing against her back as they proceeded up the stairs (463).

She did not identfy the men in Court but described the taller man as 5′ 10″ or 5′ 9″ or 10″ and described the shorter man with the heavy black beard and dark clothes as skinnier than the taller man, who was wearing light tan clothes and he was heavier (460, 465). The taller man put on a ski cap, or mask, which covered his face (470). She told how the employees were ordered into an office adjoining the cashier's office (465-469) and how the taller man went into the cashier's office (473). She saw the man leave the cashier's office but didn't remember if they carried anything out (476) and they walked out together and closed the door as they left the office (477).

Ernestine Pisciotto testified she was employed at State Laundry on March 18, 1966, and was out in the hall telephone booth talking (488) when she saw Mrs. D'Amora and Mrs. Clarke at the bottom of the stairs with two men (490). Castellano came up to her, told her to hang up, took the receiver from her hand, and put it in the cradle of the phone (490-492).

Castellano had a fairly heavy two or three days' growth of beard, darkish-light brown (491), on the day of the robbery. The other man had on a ski mask and

she only could see his eyes and nose (493). He was stocky in build and about the same height as Castellano (493). The stocky man took one of the girls into the cashier's office while Castellano held a gun on her and the other employees and told them to "lie down" (494-495) but no one would lie on the floor because it was dirty. The other man was in the cashier's room and carried out a little blue school bag (496) and he ran out, accompanied by Castellano (497).

Ernestine Pisciotto further testified she learned defendant Gonzalez' name from the newspapers (520) although she did not know who it was when he walked up the stairs (521), but she did recognize Castellano (531) as the man with the beard (534) whom she had observed for 5 or 6 minutes during the robbery (536, 537). A few hours after the robbery, she identified Castellano at the police station, without a beard, as one of the robbers but did not identify the other man (541, 543, 545, 547, 554-557).

One day before she testified, she was shown two photos of Castellano and Gonzalez by the Assistant District Attorney and asked if she could identify them, and she told him she could identify only Castellano (560-563). Mrs. D'Amora and Mrs. Clarke were also present with her and the Assistant District Attorney (568-571) and Mrs. Clarke stated she could not identify either man. Although other witnesses were present, Mrs. D'Amora was not present at the station house when she identified Castellano (578).

Anita Marks testified she was present during the robbery on March 18, 1966, committed by a man with a ski mask and a bearded man, but could not identify Gonzalez or Castellano as the perpetrators (580-584). She saw the men armed with guns, and saw the masked man leave carrying a school bag (585-586). She saw a dark colored,

maybe black or dark blue (587, 590) car pull away fast from the front of the building (591), although she couldn't say whether the perpertrators were in the car as it fled from the scene (591).

Madlyn Clapp testified she was the cashier at State Laundry on March 18, 1966, when two men entered her office walking behind Mrs. D'Amora and Mrs. Clarke (600-606). While a man who was fairly short, fair haired and husky, held a gun on the other employees, the man with a multicolored ski mask armed with a gun removed $456 (currency) and checks from her office safe after she opened it on his demand (605, 606). The masked man was about 5′ 10″ with a stocky build, wearing a short jacket (608) and carried a child's school bag (609, 610, 611). The taller man was masked and he was the one who took the money and checks (621, 623, 625).

Sandy Imbriana testified she was a bookkeeper at State Laundry on March 18, 1966, when a stocky built man about 5′ 10″ wearing a ski mask charged into the cashier's office, armed with a small gun, and said, "I want the money . . . This is no joke lady, I want the money" and threw a valise on her desk (641). He stuck the gun in her side and told her, "I know there is money here" and ordered her to open the safe (642). She called Mrs. Clapp into the room and asked her to open the safe (643, 644, 645) and he grabbed something and she ducked beneath a desk with Mrs. Clapp.

Richard Phillips testified he was employed by TWA and he knew both Gonzalez and Castellano and identified them in the court room (647). On March 18, 1966, he was asleep at home at about 2 P.M. when Gonzalez woke him (648) and asked him to take a ride to Copiague (649). He went for a ride in a '60 or '61 Chevrolet (651) and sat in the center front seat as Gonzalez drove (652) with Castellano

at his right and he went to a diner with Gonzalez while Castellano walked across the street to a barber shop (653) but didn't see him enter the shop. After he ate a sandwich, he and Gonzalez walked across the street and met Castellano waiting outside the barber shop. He appeared different in that he had a haircut and was clean shaven (654) as he appeared to need a shave just prior as his beard was "dark, you know black" (654).

The three returned to their car and proceeded on their journey to Copiague. En route, they stopped at a light and a grey car came alongside. The man in the right front seat hollered something but Gonzalez drove away some 600 or 700 feet when Castellano (after requesting Gonzalez to stop, which request was ignored by Gonzalez), pulled out the ignition key and the Chevrolet stopped. He heard backfire, then a gun shot and he turned and saw a detective with a gun pointed at him. Castellano and he turned again and Gonzalez wasn't there. He had left the car (655-659). He was handcuffed along with Castellano and taken to the police station (659).

Kenneth Block testified he was the office manager at State Laundry, Hempstead, and was present during the holdup on March 18, 1966, and that Gonzalez was a former employee although he did not know him (665, 667). He identified Castellano as one of the gun men (670). He saw Castellano at the police station through a one-way mirror (680) where he was asked if Castellano was one of the parties (681). He was shown two photos, prior to testifying, by a detective which refreshed his recollection (683-686, 729-732, 733-735) and he was able to identify him at the trial some 16 months after the holdup.

Patrolman Francis A. Guzzo testified he was on patrol in the Village of Hempstead on March 18, 1966, shortly

after 1:20 P.M. (738). About 1 mile (743) from the State Laundry, he saw a blue '59 or '60 Chevrolet with license #SK 8919 (741) which he copied down. He identified the operator of that car as Castellano (742) but did not identify the other man. He followed the car a short distance and was about to stop the car, because they had cut him off, when he received a radio message about the robbery. He overtook and passed the vehicle to respond to the scene of the robbery. He gave his information about the car and the passengers to the detectives (740-743, 762, 764).

Detective James Moran testified that he was at the robbery scene shortly after 2 P.M. and was assigned to check automobile registration SK 8919 as possibly connected to the robbery (783-785). He drove to Lindenhurst, together with two other detectives, and found a 1964 blue Corvair with the registration. While one detective went to phone their superior officer of their findings, Detectives Moran and Kreitzman remained at the location of the blue Corvair. Shortly thereafter, a 1960 blue Chevrolet bearing registration SK 8919 (786) approached their location ,and drove by with three male occupants in the front seat. As he observed the blue Chevrolet drive past, he observed Gonzalez as the driver (788). He continued to observe the Chevrolet as it proceeded to the end of the block (789). It made a left turn and went around the block and passed in front of his car again on Wellwood Avenue (790). He proceeded to follow the Chevrolet south on Wellwood Avenue, and pulled alongside it after it turned west onto Straight Path (793). Detective Kreitzman showed his shield and ordered the car to pull over (794).

The driver slowed down as if to pull over and then sped off (794), made another turn traveling north for about 4 or 5 blocks with the police car chasing it with its

siren on (795). At the point where the Chevrolet stopped, the witness pulled up behind it and the driver's door opened and Gonzalez said, "Stop, stop, turn it off" and dashed between two houses (796-797) while Castellano and Phillips remained in the car (798). He then requested assistance of Suffolk Police via his radio (798) and saw Gonzalez again at the First Precinct in Suffolk County (798) about a half hour later (799). At the time of their arrest, Gonzalez and Castellano had about $200 on them (815-816).

Patrolman John Edward Shirvell testified he responded to the aid of Detectives Moran and Kreitzman at about 3:30 P.M. on March 18, 1966 (817). He was advised of the events and began to cruise the area for the driver of the car (818). He saw him ¼ mile from the location (820) at a phone booth, and saw Gonzalez run from the booth along Sunrise Highway (820) and chased him by car and by foot near a wooded area where he ordered him to stop. He fired a shot at him (821) and a second shot a short time later during the chase (822) as Gonzalez ran into the woods.

He radioed for assistance and continued his search for Gonzalez as he circled the woods (825). A helicopter joined in the search (826) and he saw Gonzalez again as he was wrestling with another policeman (826). He handcuffed Gonzalez and delivered him to the detectives at the First Precinct, Suffolk County (827).

Patrolman Jeffrey J. Carter testified he apprehended Gonzalez as he came out of the woods (831) when he was able to overtake him (832). He was joined by Patrolman Shirvell (833).

The Federal District Court Hearing

At the hearing before the Honorable Gerard L. Goettel the respondent, People of the State of New York, produced

Robert W. Shebar, Esq., a former Assistant District Attorney, Mr. Kenneth Block, an employee of the State Laundry of Hempstead, and Detectives Howard Herold and James Moran of the Nassau County Police Department, who took part in the investigation of the robbery in question.

Of course, the interrogatories of Mrs. D'Amora were made exhibits before the Magistrate, as well as the original transcript of the trial transcript of minutes.

Summary and Totality of All the Facts and Circumstances

On May 18, 1966, two men committed an armed robbery of the State Laundry in Hempstead, Nassau County. One of the men entered the premises and approached Marguerite D'Amora, the switchboard operator and told her that he and his partner were there to commit a robbery. He brought her over to the second man who entered the premises and went into the back room of the reception area, and brought out a second woman, one Kitty Clarke. At this point, the taller of the two perpetrators put on a ski mask. The two men conducted these two women upstairs to the cashier's office where they held them, and a number of other employees, at bay while the safe was rifled and cash and checks removed.

Subsequent thereto, the two men made their escape. The vehicle operated by the two men was observed leaving the area by a Hempstead Police Officer and Nassau County detectives went to the area where they believed that the car with the plate number described was located. On their arrival, they found that the vehicle with the plate number given them by the Hempstead Town Police Officer was not the vehicle he had described to them.

While a check was being made to verify the accuracy of the plate number, the officers observed a vehicle with a vehicle identification plate number one digit less than the original plate number given them, said plate being attached to a vehicle matching the description of the vehicle observed by the officer at or near the scene of the crime.

The officers gave chase and James Castellano was immediatly taken into custody and as a result of an alarm given by the Nassau County Police, Manuel Gonzalez, the relator herein, was arrested approximately one mile from the place where Castellano was taken into custody. Upon arrival in Suffolk County Police station, both Castellano and Gonzalez confessed their implication in the crime.

As we read the record of the hearing before Magistrate Goettel, that confession given by the relator herein was voluntarily made. As a result of that confession, the relator herein went to a refuse can at or near the place he escaped from the vehicle, and turned over to police the checks taken in the robbery. Other property was also recovered as a result of statements given by the defendant and by his help in retrieving this property including the weapons and clothing used during the commission of the crime.

Prior to this occurrence Marguerite D'Amora, the only witness who could specifically identify the defendant, gave a description of the defendant to the police. She described the relator as a male white, 5′ 10″ tall, stocky build, 26 years old, blond hair. The photo of the relator before the Court indicates that he is a male white, between 5′ 8″ and 5′ 9″ tall. He weighed 194 pounds and was 27 years 2 months old, at the time of the crime. His hair is not blond but is brown or black.

Approximately two months after the commission of the crime (May 12, 1966), the identification witness, Marguerite D'Amora, appeared before a Nassau County Grand Jury and was shown two photographs, one of the relator, and one of his co-defendant, and she identified each as the persons who committed the robbery on March 18, 1966.

Immediately prior to her testimony at the trial (on or about August 15, 1967), she was shown one photo of the defendant. During the trial, she identified the defendant as the perpetrator of the crime. This was the only identification testimony offered against the defendant. The other evidence which was introduced at the trial against the relator involved his presence in the vehicle, and his flight from the vehicle.

Prior to the commencement of the trial of the defendant, the Supreme Court of the United States decided *Miranda* v. *Arizona*, 384 U.S. 436. As a result of the decision in *Miranda*, and the retroactivity determination in *Johnson* v. *New Jersey*, 384 U.S. 719, the confession and the mountain of other evidence secured as a result of the confession was rendered inadmissible at the defendant's trial.

Reasons for Denying the Writ

I. No real conflict in the Circuits and in the New York State Court of Appeals

This Court has on at least three separate occasions pronounced the test to be applied in identification cases where there is a possibility of denial of due process (*Stovall* v. *Denno*, 388 U.S. 293 [1967]; *Simmons* v. *United States*, 390 U.S. 377 [1968]; *Neil* v. *Biggers*, 409 U.S. 188 [1972]).

In *Simmons* v. *United States*, this Court said that a conviction would be set aside on the ground of denial of due process only if:

> "the pretrial identification procedure was so impermissibly suggestive as to give rise to a *very substantial* likelihood of *irreparable* misidentification." (Emphasis added.)
>
> "This determination [is] to be made in *light of the totality of the circumstances* of the case." (*Stovall* v. *Denno*, *supra*, at 302; *Simmons* v. *United States*, *supra*, at 383).

This Court's statement in *Neil* v. *Biggers*, *supra*, appears to have clarified the area even further.

> "The central question was not whether the procedures were suggestive, but whether, under the *totality of the circumstances* the identification made gave rise to a clear danger of mistaken identification." (Emphasis added.)

The gravamen of the issue now becomes, was the identification correct. If there is doubt as to a proper identification, the suggestiveness of the showup becomes of material importance. It is contended that the suggestiveness of the showup is of no moment if it can be shown that the identfication was correct, under the totality of the circumstances.

The theme that recurs time and time again throughout the cases of this Court and of the lower courts in identification due process cases is the possibility of the conviction of the innocent. Initial misidentificaton at the investigative stage under circumstances where that misidentification is "irreparable" are all the evils condemned.

No per se rule governs the due process cases; the question is one of accuracy of the identification (*Rutherford* v. *Deegan*, 406 F. 2d 217, 218-219, *cert. den.* 395 U.S. 983 [1969]).

From all the cases it is clear that this Court's position is that one must look to the *totality of the circumstances* to decide the due process question, when there has been an impermissible suggestive showup and there is a substantial likelihood of a misidentification.

The Second Circuit has followed this Court's pronouncement of the test, espousing it in *Carter* v. *Mancusi*, 460 F. 2d 406 [2nd Cir 1972] and *Gonzalez* v. *Zelker*, 477 F. 2d 797 [1973].

In *Gonzalez* v. *Zelker*, the Second Circuit espoused the Supreme Court's test word for word.

> "Although the showing of a single photograph is impermissibly suggestive our inquiry must be whether, *under all the circumstances*, it gave rise to a very substantial likelihood of irreparable misidentification" (at 801).

Petitioner contends there is a conflict between the Circuits as to the standard to be applied under this Court's decision in *Simmons* v. *United States*, *supra*. Petitioner contends that the D.C. Circuit follows the test used in *United States* v. *Gambrill* (449 F. 2d 1148) [D.C. Cir. 1971]. That test places the burden upon the prosecution to show by *clear convincing* evidence that there was an independent basis for the in-court identification other than the impermissibly suggestive showup (*United States* v. *Gambrill*, *supra*, at 53).

Clearly, the "clear and convincing" test is not necessarily the test that the Second Circuit follows nor is it the test that this Court has fashioned.

But, in any event, the New York State Court of Appeals has in effect apparently adopted the "totality of the circumstances" test (see *People* v. *Brown*, 20 N.Y. 2d 238; *People*

v. *Bellott*, 20 N. Y. 2d 600; *People* v. *Logan*, 25 N. Y. 2d 184; *People* v. *Beyer*, 25 N. Y. 2d 833 [further affirmed *United States ex rel. Beyer* v. *Mancusi*, 436 F. 2d 755]; *People* v. *Ganci*, 27 N. Y. 2d 418, 429), while placing the burden on the prosecution to establish an independent basis for in-court identification by *clear and convincing* proof (*People* v. *Burwell*, 26 N. Y. 2d 331, 336).

II. Any apparent conflict resolved by this Court's action in Neil v. Biggers, 409 U.S. 188

Petitioner argues that to quell the alleged conflict between the Circuits as to what test to follow—totality of the circumstances or clear and convincing evidence—this Court should grant certiorari in this case. Respondent respectfully opposes such request.

It has been frequently said in the past that where there is such a square conflict, "the Supreme Court grants certiori irrespective of the importance of the question of law involved" (Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States 629 [Wolfson and Kurland ed. 1951]. See also: Stern and Gressman, Supreme Court Practice, 101 [1st Ed. 1950]).

But there is increasing evidence that the existence of a conflict, without more, is not always enough to convince the Court that certiorari should be granted (Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465 [1953]). Mr. Justice Harlan has stated that:

> "even where a true conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Court of Appeals. . . . The nub of these qualifications is that a conflict of decision may safely be relied on as a ground for certiorari only in instances where it is clear that the

> conflict is one that can be effectively resolved *only* by the prompt action of the Supreme Court *alone.*" (Mr. Justice Harlan, Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 Australia L.J. 108 [1959]).

It is respondent's contention that with the decisions of *Stovall, supra, Simmons, supra* and a further clarification by *Neil* v. *Biggers, supra* the purported conflict with cases following the *Gambrill* test becomes moot because a conflict with a decision which has been discredited or which has lost all weight as authority by reason of intervening decisions of the Supreme Court will not be grounds for certiorari to issue (Gressman and Stern, Supreme Court Practice 157 [4th ed. 1969]).

III. The instant case is not the proper case to decide the apparent conflict

A direct conflict between the decision of the Court of Appeals of which review is being sought and a decision of this Court is one of the strongest possible grounds for securing the issuance of a writ of certiorari. But here, the Court of Appeals of the Second Circuit's decisions, where review was sought and pronounced, do not conflict with this Court's test, but rather it is the Court of Appeals of the District of Columbia which has apparently espoused a different test. Therefore, respondent argues the proper case for review of the test, if one is needed at all, is not *Gonzalez* but rather a case arising from the District of Columbia Circuit (*Ash* v. *United States*, 41 U.S.L.W. 3390), which came from that Circuit and was returned there for further hearings.

Finally, petitioner contends that to uphold the *Simmons* test used in *Gonzalez* would merely be dicta as to the issue of the conflict between the Circuits in which test to

use. The Circuits that may use the "clear and convincing" test will still not have been explicitly reversed and directed to use the proper test as fashioned in *Simmons* v. *United States.*

IV. Using the totality of the circumstances test, petitioner was not denied due processs of law by the in-court identification by Mrs. D'Amora of Gonzalez

The rules applicable to pre-trial photographic identifications were codified by this Court in the *Simmons* case, *supra.* In that case, this Court relied heavily upon its prior decision in *Stovall* v. *Denno, supra.*

Basically, of course, the rule is one founded on the due process requirements of the Fifth and Fourteenth Amendments. As we read these rules, this Court determined that there was nothing improper per se in pre-trial photographic identifications. However, such procedures may, in an extreme case, deprive a defendant of due process of law.

This Court in *Simmons* stated:

> ". . . We hold that each case must be considered on its own facts, and that convictions based on the witness' identification at trial following a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

This Court continually points to the fact that the evil possible in an improper procedure is misidentification—the identification of the innocent.

It should also be noted that in the *Simmons* case, this Court pointed to the use of cross-examination as the major tool to prevent the identification at trial of innocent persons.

It was stated:

> "The danger that use of the technique [photographic identification] may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the methods potential for error."

The danger again is misidentification at the investigation stage. Later stated in *Simmons*:

> "Taken together, these circumstances leave little room for doubt that the identification of Simmons was correct, even though the identification procedures employed may have, in some respects, fallen short of the ideal."

There have been numerous cases both in this Court, State courts, and in the Second Circuit Court of Appeals, which have applied this standard to specific factual allegations. For example, the rulings in the *Springle case (United states ex rel. Springle* v. *Follette*, 434 F. 2d 1380; *United States ex rel. Beyer* v. *Mancusi, supra;* and *Phipps* [*United States ex rel. Phipps* v. *Follette*, 428 F. 2d 912]) indicate clearly, as we read them, that the procedure must be of a radical, almost intentional deprivation of the due process right before an in-court identification will be suppressed.

For example, in the *Phipps* case, *supra*, Judge Friendly stated:

> "The effort must be to determine whether, before the imprint arising from the unlawful identification procedure, there was already such a definite image in the witness' mind that he is able to rely on it at trial without much, if any, assistance from its successor" (p. 915).

In *Phipps*, the witness saw the relator in that case for 20 to 30 seconds, part of which time he was fighting with a co-defendant. Within a very short time, he saw the co-defendant whom he had a much better look at, and Phipps, together in a two man showup. He identified both. He later saw Phipps at a preliminary hearing and testified that his identification was not because he saw Phipps in the showup.

It is obvious the District Court was attempting in this case to delve into and to determine the mental process of a witness. It is respectfuly submitted that the interrogratories taken of the witness in this case and her answers to the questions put to her by the Magistrate in Virginia are extremely important in determining her mental process at the time of trial.

If we look further to the ruling of the Court in the *Rivera* case (*United States ex rel. Rivera* v. *McKendrick*, 448 F. 2d 30), we find an example of one of the few cases where an in-court identification was determined to be, at least on the record before the Court, inadmissible unless the People could prove its admissibility at a later hearing.

In that case, as we view it, there were a large number of questions left open before this Court. For example, an unnecessary hospital identification was conducted but the result of that procedure was unknown. The manner used in presenting photographs in *Rivera* appears to have been suggestive on its face. Further, it was unknown whether or not the victim picked *Rivera* from a spread of photographs.

In *Foster* (*Foster* v. *California*, 394 U.S. 440), we find a classic procedure pointing inexorably to unfairness. The witness in that case could not identify the defendant in an unfair lineup nor could he identify the defendant in a

showup. Until later in another lineup where the defendant was the only person who had been in the prior lineup was the victim able to make an identification.

This Court in that case cited the *Caruso* case (*People* v. *Caruso*, 68 Cal. 2d 183, 188, 65 Cal. Rptr. 336, 340, 436 P. 2d 336, 340 [1968] as follows:

> "We do no more than recognize . . . that unfairly constituted lineups have in the past too often brought about the conviction of the innocent."

Does the instant case mirror the *Foster, Rivera* situation or does it more closely coincide with the factual situations in *Springle, Beyer, Phipps* and, indeed, in *Simmons* itself?

It is the respondent's position that considering all the factors involved, and comparing the facts before the Court with the facts of these cases, the answer is obvious. The procedure in this case did not deprive the relator of due process of law.

We respectfully submit that on the facts of this case, the witness D'Amora had ample opportunity to view the defendant at the time of the crime (see: *Simmons, supra; Beyer, supra; United States ex rel. Anderson* v. *Mancusi*, 413 F. 2d 1012; *United States ex rel. Valentine* v. *Zelker*, 322 F. 2d 440).

We further respectfully submit the description given by the witness D'Amora which is subject to much greater analysis in the prior papers submitted by the respondent in the District Court, can only be termed a very accurate description (see: *Beyer, supra; United States ex rel. Williams* v. *Lavallee*, 415 F. 2d 643, *cert. den.* 397 U.S. 997, *United States ex rel. Rutherford* v. *Deegan*, 406 F. 2d 217, *cert. den.* 385 U.S. 93).

We further submit in relation to that identification that there is little or no evidence on the record that there was an initial uncertainty as to the identification (see: *Foster ,supra; Anderson, supra; United States ex rel. Geralds* v. *Deegan*, 307 F. 2d 56).

It should be noted also at this point that the identification witnesses at the trial were subjected to extremely lengthy cross-examination.

It would also seem that the learned Magistrate practically ignored the interrogatory responses of the witness, D'Amora, submitted as the Court's exhibit number 2, at the hearing.

A relevant excerpt from the interrogatories pages 4 and 5 states:

> "The Court: When you testified at the trial and identified Manuel Gonzalez as the man who approached you at the switchboard and eventually put on the ski mask, were you positive in fact, that he was that man?
>
> Mrs. D'Amora: Yes, I was.
>
> The Court: Are you positive today that your identification of Manuel Gonzalez was correct?
>
> Mrs. D'Amora: At the time I identified him, I made my identification as what happened in the office.
>
> The Court: Are you positive today that the identification that you gave in the trial is correct?
>
> Mrs. D'Amora: Yes.
>
> The Court: Did anything that occurred between the time of the crime and the time you testified at

the trial influence you in making an identification of Manuel Gonzalez?

Mrs. D'Amora: There wasn't.

The Court: No?

Mrs. D'Amora: No.

The Court: If you had not seen any photographs of Gonzalez between the time of the crime and the time you testified at trial, would you have been able to identify him?

Mrs. D'Amora: To the best of my knowledge as of the day he walked into my office, yes.

The Court: All right: Did you see either of the two men who committed the robbery in the courthouse prior to your testifying at the trial?

Mrs. D'Amora: I'm sorry, would you repeat that?

The Court: Did you see either of the two men who committed the robbery in the courthouse prior to your testifying at the trial? (pause)

In other words, did you see them before you went on the witness stand to identify them?

Mrs. D'Amora: Yes, I did. They were walking and I was sitting in the corridor—and they were walking in—on the other side of the room.

The Court: Could you have identified Gonzalez in court if you had not seen this photograph in the Grand Jury? (pause)

I'll repeat that question. Could you have identified Gonzalez in court if you had not seen his photograph in the Grand Jury?

Mrs. D'Amora: Yes.

The Court: Could you have identified Gonzalez in court if you had not seen his photograph prior to testifying at the trial?

Mrs. D'Amora: Yes.

The Court: Did seeing Gonzalez' photograph in the Grand Jury influence your identification of him at the trial?

Mrs. D'Amora: No.

The Court: Did seeing Gonzalez' photograph prior to your testimony influence your identification of him at the trial?

Mrs. D'Amora: No.

The Court: If you had not seen any photographs of Gonzalez, would you have been able to identify him at the trial?

Mrs. D'Amora: At that time, yes."

Although the interrogatories revealed that the witness' present recollection of the personages involved in the identification might be dim, she surely knew that she was correct at the time that she made the identification. Additionally, she revealed that her identification was in no way tainted by any photographs shown to her. She was positive of her identification of Gonzalez at the scene and could have identified him without photographs.

In *Neil* v. *Biggers* (*supra*), the defendant was convicted after a jury trial where part of the evidence adduced consisted of the victim's visual and voice identification of the defendant in a stationhouse showup seven months after the incident. The case went through the State system to this Court, where an affirmance was made by a 4-4 decision.

A federal habeas corpus petition revived the litigation. The Federal District Court, after a hearing, held the stationhouse identification procedure so suggestive as to violate due process and accordingly set aside the state conviction. The Court of Appeals affirmed (448 F. 2d 91 [1971]).

This Court's decision was relevant here in two respects:

(1) The court re-examined the lower court's findings by addressing itself to the merits and delved into the factual background. This, as explained by Justice Brennan's dissent, was a departure from the practice of the court. The implication is clear that the court is rolling back the threshold of examination in the identification area where facts have constitutional significance.

(2) The definition of what constitutes a deprivation of a defendant's due process rights in the identification area has been narrowed, especially where the challenged prosecutorial action (photo at grand jury) occurred prior to the advent of United States v. Wade, 388 U.S. 218 and *Stovall, supra.* The central question was not whether the procedures were suggestive, but whether, under the totality of the circumstances, the identification made gave rise to a clear danger of mistaken identification.

As applies to the case at bar, and in response to petitioner's brief, we submit that:

(1) The Circuit Court was not limited by the facts as determined by the District Court, where those conclusions made upon facts were erroneous.

(2) Alternatively, using standards in *Biggers* (*supra*), the Circuit Court could re-examine the facts and reverse on the basis that the findings of the District Court were clearly erroneous, in that the identification procedures herein did not mar the reliability of Mrs. D'Amora's identification of Gonzalez' part in the robbery or give rise to the danger of mistaken identification under the *totality of the*

circumstances, even though the photo showup might have been suggestive.

I. In Footnote #3 the majority ,through Justice Powell in *Biggers* (*supra*), at 379, says:

> "This rule of practice, under which the Court does not lightly overturn the concurrent findings of fact of two lower federal courts, is a salutary one to be followed where applicable. We think it inapplicable here where the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them. Moreover, this a habeas corpus case in which the facts are contained primarily in the state court record (equally available to us as to the federal courts below) and where the evidentiary hearing in the District Court purported to be 'confined' to two specific issues which we deem not controlling."

Here, in due deference to petitioner's brief, the Circuit Court was not proscribed from examining the factual findings of the District Court. This was a habeas corpus proceeding where factual findings were overlaid upon an already well developed state record. The findings of fact fit the definition above in that they are not elemental facts, but couched in constitutionally significant language.

Reiterating, the description given by Mrs. D'Amora cannot be really termed inaccurate in view of Mrs. D'Amora's agitated condition. Similarly, the record in the District Court only establishes the present uncertainty of identification. The initial certainty remains through Mrs. D'Amora's answers to the interrogatories—that she was sure of her identification at that time, which was totally ignored by the magistrate and District Court below.

Turning again to *Biggers supra*, this Court synopsized the fulcrum point of the decision as follows:

> "We turn, then, to the central question, whether under the ['totality of the circumstances'] the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Applying these factors, we disagree with the District Court's conclusion."

Assuming, *arguendo*, a suggestive confrontation procedure here, examine the factors indicating reliable identification.

The description of the petitioner was not perfect, given in D'Amora's agitated condition, but was within one or two inches of the petitioner's height, accurately described his stocky build and was within a year on age. She did, however, mistake the hair color.

The viewing was in a well lighted office from a distance varying between twelve feet to one foot . Petitioner was pointing a gun at her, so D'Amora certainly was attentive.

The first time D'Amora saw the petitioner in person after the incident was at the trial. As shown by the interrogatories, she is presently sure that her identification was accurate. She was also subjected to extensive cross examination on the point.

The District Court's conclusions of the critical facts were erroneous as being unsupported by the record of the hearing and the trial record established through the highest court of the State of New York.

In addition, the constitutionally significant point here is Mrs. D'Amora identified the picture of the petitioner within the parameters set down by *Biggers* (*supra*). Factually, *Biggers* is more distant from arguing proper identification than the case at bar. There the observation at the crime scene was short in time in dim light. The description of the defendant was general at best. The identification took place at a showup after a hiatus of seven months. Yet, the Court held the identification reliable.

Here the first identification took place only a short two months after the incident before the grand jury. Mrs. D'Amora was shown two photographs and she pointed to a picture of the petitioner as being one of the robbers. At least this identification sealed her testimony at an early point when the incident was still fresh in her mind.

Later, in August 1967 immediately prior to trial, the prosecutor, in his office, showed several of the witnesses photographs of the perpetrators and asked if any of the witnesses could recognize either or both of the robbers. Some of the witnesses were unable to identify anyone, but Mrs. D'Amora apparently picked out the defendant.

Thus, assuming the later photographic identification was suggestive, looking at all of the facts, including the interrogatory responses and the trial in-court identification, the conclusion must be that D'Amora's identification was reliable.

Accordingly, and based on all the foregoing, the defendant-relator was not deprived of his right to due process of

law by the testimony of the witness D'Amora identifying him as one of the two robbers.

V. No danger or irreparable harm or mistaken identification in the instant case

The theme that recurs time and time again throughout this Court and of the lower courts in identification due process cases is the possibility of the conviction of the innocent. Initial misidentification at the investigative stage under circumstances where that misidentification is "irreparable" are the evils condemned. The question then becomes one of accuracy of the identification. Numerous decisions have alluded to other factors in the case bolstering or supporting the identification testimony demonstrating that it is correct, and that there is no misidentification involved.

In the case at bar, the respondent at the hearing proved, at least *prima facie*, that the confession given by the relator within a short time after his arrest was voluntary in nature, and further it was taken under circumstances lawful at the time, and the police made a greater effort than was required at the time to both inform the defendant of his rights, and to preserve those rights.

This confession, we submit, should have been admitted at the habeas corpus hearing for a number of reasons: Firstly, it clearly and irrevocably demonstrates, both by its contents and by the property recovered as a result of it, that the identification testimony of Marguerite D'Amora was correct, and under no circumstances a misidentification of an innocent person. Therefore, we submit it was relevant before the magistrate.

Secondly, a habeas corpus hearing is not per se an appeal. Obviously the Federal District Court on habeas corpus petitions is not limited exclusively to the state court

record for, indeed, in this case a further record was made before a magistrate to whom this matter was referred by the Hon. Irving Ben Cooper.

Thirdly, the confession being relevant and voluntary was admissible in habeas corpus even though it might be inadmissible at a trial of the guilt or innocence of the relator.

Again, we refer to the very nature of habeas corpus; this great writ cuts through many procedural norms to reach the gravamen of a situation in determining the legality or illegality of a man's incarceration. It is and must be, because of its great power and because of its use as a last resort, a proceeding which seeks justice in its purest sense, both for the petitioner and for the governmental agency-respondent.

We do know now that confessions taken in violation of the *Miranda* rule are admissible in some instances. For example, this Court has determined that they may be admissible during a state court trial as a prior inconsistent statement.

Habeas corpus courts have determined that they are admissible in extradition proceedings (see: *United States ex rel. Vitiello* v. *Flood*, 374 F. 2d 554). Habeas corpus does not involve the introduction of evidence against "another." It does not punish in the penal sense any person. It seeks the truth.

In this case, the confession of the relator is an important element in finding the truth of this situation.

It has been and remains the People's position in relation to this confession that the rule of retroactivity announced by this Court in *Johnson* v. *New Jersey*, 384 U.S. 719, mandating that the *Miranda* requirements apply to all

"trials" subsequent to the date of *Miranda* has been abrogated by later decisions of this Court to such an extent and with consistency that the *Johnson* rule has been, in fact, overruled and that the confession at the time it was offered to the magistrate would have been admissible in any court on any issue.

Subsequent to *Johnson*, this Court decided *Jenkins* v. *Delaware*, 395 U.S. 214, wherein the Court indicated that *Miranda* would not apply to re-trials which occurred subsequent to the date *Miranda* was decided.

A true application of the *Johnson* rationale would have had *Miranda* rules apply to such trials. In addition to that case, this Court decided *Desist* v. *United States*, 394 U.S. 244; and *Kaiser* v. *New York*, 394 U.S. 280, rehearing denied 394 U.S. 1025, concluding that the effective date of new rules was not the trial time but when the police action complained of occurred. Obviously the date of trial is a purely fortuitous determination having no bearing and being, in fact, irrelevant to the question of retroactivity.

We will not further take up the time of this Court to delve into the considerations given by this Court to retroactivity issues. It is, we maintain, self-evident that considering those issues, the trial date is absolutely meaningless (see: *Stovall* v. *Denno, supra;* see also in this regard *People* v. *Feinlowitz*, 29 N.Y. 2d 176). (See also on this issue *Williams* v. *United States*, 401 U.S. 646; and *United States* v. *White*, 401 U.S. 745.)

In conclusion, therefore, we submit that for all of these reasons, the confession was admissible at the habeas corpus hearing, and should have been considered therein as conclusively showing the accuracy of the complained of in-court identification. Accordingly, there was no danger of irreparable and mistaken identification in this case.

VI. Conclusory observations

The rule of due process is simply stated. The term is equivalent to the word "fairness". The defendant in a criminal action and, indeed, the People are entitled to fundamental fairness and, therefore, due process (see *Snyder* v. *Massachusetts*, 291 U.S. 97, at 105).

In the case at bar, the identification of the respondent by the witness D'Amora was not of any great importance until the time of trial. Indeed, the initial identification of the petitioner was from this confession and from the overwhelming amount of physical evidence recovered as a result of his confession. Immediately subsequent to the crime and up to and including the presentation to the Grand Jury, the witness' identification testimony was of very little importance to the People's case. Only when *Miranda* removed this evidence from the case was the testimony of Marguerite D'Amora crucial to the prosecution of this case.

The People were caught in the whipsaw of changing constitutional rules by this Court. A voluntary confession, the exclusive fruits of that confession, was the evidence depended on by the People to prove their case against Manuel Gonzalez, and the retroactivity rule of *Johnson* eliminated that overwhelming evidence.

We respectfully submit to this Court that no police agency in Nassau County deprived the defendant of any constitutional right. Every step was taken to preserve the rights of the relator in this Court and of his co-defendant, and the situation at the time of trial was not caused by any known wrong committed by a police agency or by any state officer.

The People respectfully request this Court to consider the confession at least to the extent that it shows the good faith of the People, and that it proves "necessary" the

pre-trial procedure used by the Assistant District Attorney which is so heartily complained of by the petitioner herein.

While not controlling in this case, nor even specifically applicable, we ask the Court to review the thinking of the Congress of the United States when it passed and sent to the President what has become Title 18, § 3502 of the United States Code, which mandates that "The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court, ordained and established under Article III of the Constitution of the United States."

Consider the section with this Court's decision in *Kirby* v. *Illinois*, 406 U.S. 682. In that case, this Court decided that the *Wade* trilogy of cases so far as they concern the Sixth Amendment right of a defendant were not applicable to a defendant who had not been indicted at the time of the lineup (where no formal court proceedings or accusations had been instituted).

Kirby obviously negates to a large extent the import of the *Wade* rule because obviously *Wade* was not decided on a pre or post-indictment basis but upon a critical stage basis, more akin to the rationale of *Miranda* than to the rationale of *Massiah* (*Massiah* v. *United States*, 377 U.S. 201).

As Judge Medina stated in *United States ex rel. Beyer* v. *Mancusi*, supra, at 756:

> "The rules of *Wade, Gilbert and Stovall* should not be applied in such fashion as to constitute escape hatches for the guilty."

CONCLUSION

For the above stated reasons the petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

WILLIAM CAHN
District Attorney, Nassau County
Attorney for Respondent

HENRY P. DEVINE
JULES E. ORENSTEIN
Assistant District Attorneys
Of Counsel.

APPENDIX A

Opinion of the United States Court of Appeals Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 413—September Term, 1972.

(Argued January 31, 1973 Decided April 17, 1973.)

Docket No. 72-1945

UNITED STATES OF AMERICA
ex rel. MANUEL GONZALEZ,

Relator-Appellee,

—against—

JOHN ZELKER, Warden, Green Haven Correction Facility,

Respondent-Appellant.

Before:

ANDERSON, FEINBERG and MULLIGAN,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*, granting a writ of habeas corpus after a hearing on ground that admission of an in-court eyewitness identification at relator's trial violated due process.

Reversed.

JOSEPH A. DEMARO, Assistant District Atttorney, Nassau County, Mineola, N.Y. (William Cahn, District Attorney, Nassau County, and Robert

J. Kaschak, Assistant District Attorney, Nassau County, Mineola N.Y., of Counsel) *for Respondent-Appellant.*

FRANCIS J. VALENTINO, Legal Aid Society of Nassau County, Mineola, N.Y. (James J. McDonough, Attorney in Charge, Legal Aid Society of Nassau County, and Matthew Muraskin and Susan Crandall, Legal Aid Society of Nassau County, Mineola, N.Y., of Counsel) *for Relator-Appellee.*

MULLIGAN, *Circuit Judge:*

This is an appeal from an order of Hon. Irving Ben Cooper, United States District Court Judge for the Southern District of New York, entered on July 7, 1972, granting the relator's petition for a writ of habeas corpus, after a hearing, pursuant to 28 U.S.C. § 2241. Reversed.

On March 18, 1966 the State Laundry in Hempstead, Nassau County, New York, was robbed by two armed men. The relator Manuel Gonzalez and one James F. Castellano were indicted and convicted in the Nassau County Court after a trial by jury, receiving concurrent sentences of 10 to 20 years for Robbery in the First Degree; 5 to 10 years for Grand Larceny in the First Degree; 2½ to 5 years for Assault in the Second Degree and suspended sentences for Assault in the Third Degree. Both defendants appealed their convictions to the Appellate Division, Second Judicial Department, which affirmed without opinion (31 App. Div. 2d 1006, 301 N.Y.S. 2d 424 (1969). The New York Court of Appeals subsequently affirmed 4-2 (27 N.Y. 2d 53, 313 N.Y.S. 2d 673 (1970) with Chief Judge Fuld and Associate Judge Breitel dissenting. Certiorari was

denied by the Supreme Court on January 11, 1971 (400 U.S. 996).

A writ of habeas corpus was then sought in the Southern District Court of New York on April 6, 1971. Judge Cooper referred the proceeding to United States Magistrate, Hon. Gerard L. Goettel, for report and recommendation. The Magistrate recommended that an evidentiary hearing be held and Judge Cooper so ordered. On February 3, 1972 a hearing was held before Magistrate Goettel. The principal witness, Marguerite D'Amora, was unable to attend and was deposed upon written interrogatories by the Hon. Gilbert Swink, a Magistrate of the United States District Court for the Eastern District of Virginia, the state where she now resides. On May 17, 1972 Magistrate Goettel submitted a report and recommended that the writ of habeas corpus issue. Judge Cooper adopted the report on June 19, 1972 and entered an order directing the respondent to release the petitioner unconditionally unless he was retried within sixty days. The order, however, was stayed and the petitioner is presently enlarged on bail pending the decision of this Court.

I

At the trial of this case Marguerite D'Amora testified that on March 18, 1966 she was working as a switchboard operator at the State Laundry in Hempstead, Long Island. At about 1:10 P.M. a new blue and very shiny car attracted her eye as it pulled up across the street, made a U turn and stopped in front of the laundry. Both men in the car got out and walked into the office. They were about 12 feet from her and she could clearly see their faces. She later identified the two men in court as Castellano and the relator

Gonzalez. Gonzalez walked past her toward a staircase leading to the cashier's office and because it was her job to see that no one passed, she took particular notice, asking him if she could help. Gonzalez looked into another room, walked toward her and when about one foot away pointed a gun and said "This is a stickup. Come with me." Gonzalez brought D'Amora to the foot of the stairs together with another employee, Kitty Clarke. Gonzalez then placed a ski mask over his face and he and Castellano took the women up the stairs to the cashier's office. Other employees were rounded up. Gonzalez rifled the contents of the safe taking cash and employees' checks. Both men left with a blue school bag in the same blue car. The police were called.

Patrolman Guzzo testified that he was on patrol in Hempstead on March 18, 1966 shortly after 1:20 P.M. About a mile from the State Laundry he saw a blue Chevrolet. He identified on trial the State's exhibit 19 (a picture of the car Gonzalez was driving just prior to arrest) as a picture of the car he had observed and also identified Castellano as the driver, but he could not identify the other occupant. Guzzo had been cut off by the car and was about to stop it when he was advised by radio of the robbery at the laundry. He passed the car and went to the scene of the crime where he advised the detectives of the blue Chevrolet which he considered suspicious. Detective Moran testified that while checking out Guzzo's lead in Lindenhurst, shortly after 3:15 P.M., a 1960 blue Chevrolet drove past with 3 men in the front seat and with the license SK 8918.[1]

[1] Guzzo had indicated that the Chevrolet was either a '59 or '60 model and had copied down the license as SK 8919. By the time Moran observed the robbers' auto, it had already been determined that an error had been made, since the car having license SK 8919 was a 1964 Corvair.

He identified Gonzalez as the driver. He and Detective Kreitzman followed the car and pulled alongside. Detective Kreitzman showed his shield and ordered the car to pull over. The driver slowed down but then accelerated with the police car in pursuit, siren blaring. The Chevrolet stopped, Gonzalez said "Stop, stop, turn it off" and dashed between two houses. Castellano however remained with the car and was arrested immediately. Gonzalez was observed at a phone booth one quarter of a mile away. With helicopter assistance Gonzalez was chased through a woods and finally arrested after the firing of shots and a brief wrestling match with a policeman. After their arrest both Castellano and Gonzalez confessed that they had committed the crime charged. Gonzalez led the police to a refuse can near the location where he escaped from the vehicle and turned over to the police, checks which had been taken from the laundry. Weapons and clothing used in the robbery were also recovered as a result of information given by the relator.

II

The sole issue before the court below and now on appeal is the reliability of the identification of Gonzalez by Mrs. D'Amora who was the sole witness on trial to identify him as one of the two robbers. The case for the State was overwhelming as of March 18, 1966. Mrs. D'Amora's eyewitness identification was not anticipated as a major factor in the trial in view of the confession and recovery of weapons, clothing and loot. From the State's point of view a conviction could be reasonably anticipated. Then on June 13, 1966 the Supreme Court decided *Miranda* v. *Arizona*, 384 U.S. 436, holding that a confession without appropriate

warnings, even though otherwise voluntary, was inadmissible in evidence. On June 20, 1966 *Johnson* v. *New Jersey*, 384 U.S. 719, was decided, holding that the *Miranda* requirements were to be applicable to all trials subsequently conducted. The State determined not to introduce either the confession or its fruits and thus the testimony of Mrs. D'Amora for the first time assumed major significance.

On May 12, 1966 Mrs. D'Amora had testified before the Grand Jury and was shown two photographs. She identified one as the relator Gonzalez and the other as Castellano, the men she stated had robbed the laundry seven weeks before. On June 12, 1967 the United States Supreme Court decided *Stovall* v. *Denno*, 388 U.S. 293, holding that in some cases an unnecessarily suggestive line-up is violative of due process. On August 10, 1967 just before the trial, she was shown the photograph of Gonzalez whom she again identified as the man who robbed the laundry on March 18, 1966. She adhered to this identification on trial under rigorous cross-examination. The confession of Gonzalez and the evidence of the recovery of the weapon and the fruits of the crime, were not before the jury and were not sought to be introduced by the State. Evidence was offered to establish Gonzalez' presence in the blue Chevrolet after the robbery as well as his flight and capture. On March 18, 1968 the Supreme Court decided *Simmons* v. *United States*, 390 U.S. 377, holding that an unnecessarily suggestive photographic identifictaion will, in some instances, be violative of due process. After the affirmances by the Appellate Division and Court of Appeals, the denial of the writ of certiorari, the present application for a writ of habeas corpus issued as previously set forth.

Appendix A

III

A threshold question here is what weight, if any, we are to accord the findings of fact of the Magistrate which were adopted by the court below. Normally such findings are to stand unless clearly erroneous under Fed. R. Civ. P. 52(a). We do not consider this rule to be here applicable. Mr. Justice Powell writing the opinion for the Court in *Neil* v. *Biggers*, 409 U.S. ——, 93 S.Ct. 375, 379 n.3 (Dec. 6, 1972) noted:

> This rule of practice, under which the Court does not lightly overturn the concurrent findings of fact of two lower federal courts, is a salutary one to be followed where applicable. We think it inapplicable here where the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them. Moreover, this is a habeas corpus case in which the facts are contained primarily in the state court record (equally available to us as to the federal courts below) and where the evidentiary hearing in the District Court purported to be "confined" to two specific issues which we deem not controlling.

We think this view is particularly appropriate here. The essential facts are contained in the state court record. The evidentiary hearing, for the most part, was unproductive, only confirming that which is suggested by the trial record: Mrs. D'Amora did not see any photographs prior to the Grand Jury hearing and then she was shown only those of Gonzalez and Castellano. At the hearing memories had faded regarding the August 10th picture showing, but

Miss Pisciotto's trial testimony clearly describes the circumstance surrounding that showing of the robbers' pictures to Mrs. D'Amora. It is further noteworthy that the key witness here, Mrs. D'Amora, never testified before Magistrate Goettel but was deposed in Virginia Beach where she now resides. Hence there was no opportunity for him to observe her demeanor and judge her veracity which is a major factor in appellate courts' normal reluctance to interfere with trial court findings of fact. *United States ex rel. Miller* v. *LaVallee*, 436 F.2d 875, 876 (2d Cir. 1970), cert. denied, 402 U.S. 914 (1971):

> We have in mind that when the issue the trial judge must determine relates to the validity of a witness's identification of a defendant we ought to accord great weight to the determination the judge makes, for he has seen and has heard that witness.

Moreover, as Biggers points out the basic question to be determined here is the constitutional significance to be attached to the facts. On this score the Magistrate arrived at two separate conclusions of law. First, that the photographic identification was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification, *Simmons* v. *United States*, 390 U.S. 377 (1968), and secondly, that the prosecution failed to sustain its burden by clear evidence that the in-court identification was based upon observations of the defendant other than the improper confrontations, citing *United States* v. *Wade*, 388 U.S. 218 (1967). The problem is that the so-called "per se" rule of *Wade* has been found by this circuit not appli-

cable to due process photographic identification cases[2] which are to be determined by the more flexible "totality of circumstances" test of *Stovall* and *Simmons*.

Thus Judge Medina writing for a panel of this Court in *United States ex rel. Rutherford* v. *Deegan*, 406 F.2d 217, 218-19, cert. denied, 395 U.S. 983 (1969) held:

> We think it clear that the rule of *Wade*, applicable only prospectively and requiring a hearing and finding that "the in-court identifications had an independent source" based on "clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification" or a finding that the error was harmless, is clearly not the rule governing *Stovall* or other due process of law cases. To intermingle the two separate but analogous rules of *Wade* and *Stovall* can only result in confusion. . . . We think it is clear that no *per se* rule governs the due process of law cases.

This position was reaffirmed in *United States ex rel. Miller* v. *LaVallee*, *supra* at 876.

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[2] The first photograph showing here was pre-*Wade* but the second showing just before trial was post-*Wade*. We note however that *Wade* involved the right to counsel at pretrial line-ups and in that context required "clear and convincing evidence" *aliunde* line-up identification. This circuit has consistently held (see, e.g., *United States* v. *Counts*, slip op. 1283, 1286 n. 2 (Jan. 2, 1973); *United States* v. *Johnson*, 467 F.2d 630, 637 (1972), and *United States* v. *Bennett*, 409 F.2d 888, 899-900, cert. denied, 396 U.S. 852 (1969)) that there is no constitutional right to counsel at a *photographic* identification. We are therefore not within the *Wade* rule. We do note, however, that this issue was recently argued before the Supreme Court on January 10, 1973 in *United States* v. *Ash*, Doc. No. 71-1255, 41 U.S.L.W. 3390.

While the Magistrate here espoused both rules, a reading of his final report where he discusses the legal issues indicates that in effect he adopted the "per se" approach of *Wade* espoused in *United States* v. *Gambrill*, 449 F.2d 1148, 1153 (D.C. Cir. 1971).[3]

We conclude therefore that although the showing of a single photograph (here there were two photographs shown but only of the two defendants charged with the robbery) is impermissibly suggestive, our inquiry must be whether under all the circumstances it gave rise to a very substantial likelihood of irreparable misidentification. *United States ex rel. Carter* v. *Mancusi*, 342 F. Supp. 1356, 1357-59 (S.D.N.Y. 1971), aff'd on opinion below, 460 F.2d 1406 (2d Cir. 1972).

IV

The ultimate issue is whether under the totality of circumstances Mrs. D'Amora was identifying Gonzalez on trial as the man whose photograph she had been shown twice or whether she had such a definite image of him in her mind before the unnecessarily suggestive showing, that she was relying on it rather than the photograph. *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912, 915 (2d Cir.), cert. denied, 400 U.S. 908 (1970). Precedent is of little value in cases such as this, each of which must be judged on its own facts. *Simmons* v. *United States*, *supra*

[3] The court in *United States* v. *Gambrill*, *supra*, 1153, reached the conclusion "that an impermissibly suggestive photographic display should be considered to give rise to a very substantial likelihood of irreparable misidentification if the Government is unable to show, by clear and convincing evidence, that a subsequent in-court identification is based on a source independent of the photographic display." (footnote omitted).

at 384. After a careful reading of the record we believe that there is no substantial likelihood that Mrs. D'Amora misidentified Gonzales. The robbery unquestionably made a deep impression on Mrs. D'Amora who was obviously terrified by Gonzales when he pointed the gun at her and announced the hold-up. She was only a foot away from him. She was not a casual bystander, the light was good and her attention was focussed upon him. See *United States ex rel. Frasier* v. *Henderson*, 464 F.2d 260, 264-65 (2d Cir. 1972). Her description of him, given shortly after the robbery, was, under the circumstances reasonably accurate.[4] See *United States ex rel. Bisordi* v. *LaVallee*, 461 F.2d 1020, 1024-25 (2d Cir. 1972). On trial she testified at least three times that she was certain of her identification. This positive identification is a factor which is entitled to consideration. *United States ex rel. Carter* v. *Mancusi*, *supra* at 1359. She was subjected to a thorough cross-examination which covers some 100 pages of about 500 pages of trial testimony. While there was a long period between the robbery and the trial, as Mr. Justice Harlan pointed out, the range of misidentification is lessened by cross-examination at trial. *Simmons* v. *United States*, *supra* at 384. The jury to which the evidence was directed

[4] Mrs. D'Amora initially described Gonzalez as a male, white, 5'10" tall, stocky build, 26 years of age and blond hair. Gonzalez was a white male, between 5'8" and 5'9" tall, weighed 194 lbs. and was 27 years old at the time of the robbery. His hair however is not blond but dark brown or black. This misdescription is not surprising under the circumstances. Gonzalez was standing under a fluorescent light when he faced Mrs. D'Amora and she was understandably nervous at the time of the robbery. She took four tranquilizers that day, apparently at least one after Gonzalez donned his mask but before the robbers left, and evidently suffered from nervousness a good while thereafter.

found the identification reliable and so did the appellate courts of the State of New York.[5]

We are further enlightened by Mrs. D'Amora's testimony at her deposition below.[6] After some six years Mrs.

[5] As we understand Chief Judge Fuld's dissent, he was of the opinion that the burden was on the prosecution to show by clear and convincing evidence that the in-court identification stemmed from a source independent of the two-pre-trial photographic identifications (see 27 N.Y.2d at 60; 313 N.Y.S.2d at 678) thus following the *Wade* test.

[6] The Court: Do you remember seeing photographs of either of the persons who committed the robbery

Mrs. D'Amora: I don't remember.

The Court: Before you testified in the Grand Jury (pause) Did you see such pictures?

Mrs. D'Amora: I don't remember.

The Court: During your testimony in the Grand Jury? Did you see pictures?

Mrs. D'Amora: Yes, I think I did.

The Court: Before you testified at the trial?

Mrs. D'Amora: Yes, I think I did.

The Court: In the District Attorney's office?

Mrs. D'Amora: I don't remember if it was in the District Attorney's office, or where it was that they showed me pictures.

The Court: All right. The next question is, at any time? Did you see pictures?

Mrs. D'Amora: Yes, I'm sure I did.

The Court: If you do remember any such incident, would you describe what you remember about it including who the person was who showed the picture? (pause)

Mrs. D'Amora: I don't [sic] know who it was.

The Court: How many pictures were shown?

Mrs. D'Amora: There was a picture of a car shown.

The Court: Do you know how many pictures were shown to you? (pause)

Mrs. D'Amora: I don't know. I don't remember.

The Court: Who was portrayed in those pictures?

Mrs. D'Amora: I don't remember that either.

The Court: What was said to you by the person exhibiting the photographs?

Mrs. D'Amora: I don't remember that.

(footnote continued on following page)

Appendix A

D'Amora had no clear recollection of the photographic identification procedures but still is sure that the man who was the defendant on trial, was the man who held her up.

(footnote continued from preceding page)

The Court: And, who else was present at that viewing?

Mrs. D'Amora: I was in a room, and there seemed to be a few people sitting out there.

The Court: You do not know any of the names?

Mrs. D'Amora: No, I don't.

The Court: Or their positions—whether they were police officers of [sic] who they might have been?

Mrs. D'Amora: I don't remember.

The Court: When you testified at the trial and identified Manuel Gonzalez as the man who approached you at the switchboard and eventually put on the ski mask, were you positive, in fact, that he was that man?

Mrs. D'Amora: Yes, I was.

The Court: Are you positive today that your identification of Manuel Gonzalez was correct?

Mrs. D'Amora: At the time I identified him, I made my identification as what happened in the office.

The Court: Are you positive today that the identification that you gave in the trial is correct?

Mrs. D'Amora: Yes.

The Court: Did anything that occurred between the time of the crime and the time you testified at the trial influence you in making an identification of Manuel Gonzalez?

Mrs. D'Amora: There wasn't.

The Court: No?

Mrs. D'Amora: No.

The Court: If you had not seen any photographs of Gonzalez between the time of the crime and the time you testified at trial, would you have been able to identify him?

Mrs. D'Amora: To the best of my knowledge, as of the day he walked into my office, yes.

The Court: All right. Did you see either of the two men who committed the robbery in the courthouse prior to your testifying at the trial?

Mrs. D'Amora: I'm sorry, would you repeat that?

The Court: Did you see either of the two men who committed the robbery in the courthouse prior to your testifying at

(footnote continued on following page)

This strongly supports in our view the indelible imprint made by the event and the principal characters, Gonzalez and Castellano. Mrs. D'Amora identified not only Gonzalez but Castellano. His petition for a writ of habeas corpus has been denied without an evidentiary hearing[7] and denial was affirmed in open court by a panel of this Court on April 4, 1972. While this case is not at all binding here since two other witnesses identified the unmasked Castellano, it at least supports to some extent Mrs. D'Amora's reliability to identify the robbers despite the same suggestive procedure which was employed in both cases.

We should also note that while the procedure here was suggestive there is no indication at all that the police were

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(footnote continued from preceding page)

the trial? (pause) In other words, did you see them before you went on the witness stand to identify them?

Mrs. D'Amora: Yes, I did. They were walking and I was sitting in the corridor—and they were walking in—on the other side of the room.

The Court: Could you have identified Gonzalez in court if you had not seen his photograph in the Grand Jury? (pause) I'll repeat that question. Could you have identified Gonzalez in court if you had not seen his photograph in the Grand Jury?

Mrs. D'Amora: Yes.

The Court: Could you have identified Gonzalez in court if you had not seen his photograph prior to testifying at the trial?

Mrs. D'Amora: Yes.

The Court: Did seeing Gonzalez' photograph in the Grand Jury influence your identification of him at the trial?

Mrs. D'Amora: No.

The Court: Did seeing Gonzalez' photograph prior to your testimony influence your identification of him at the trial?

Mrs. D'Amora: No.

The Court: If you had not seen any photographs of Gonzalez, would you have been able to identify him at the trial?

Mrs. D'Amora: At that time, yes.

[7] *United States ex rel. Castellano* v. *Zelker*, 71-C487 (E.D.N.Y. Dec. 8, 1971).

guilty of any activity designed to unfairly influence the trial of the relator. They were unable to anticipate *Miranda* and *Simmons* and were not attempting to circumvent normal procedures. There is no suggestion in the record that the police persuaded or coerced Mrs. D'Amora. On the contrary, our review of the minutes of Mrs. D'Amora's Grand Jury testimony and Miss Pisciotto's trial testimony concerning the August 10th photographic identification discloses that restraint was practiced. This is further evidenced by the fact that Kitty Clarke, the only other witness to see the unmasked Gonzalez, was shown the same pictures at the same time on August 10 and was unable to identify either Gonzalez or Castellano. The confession and the fruits of the crime retrieved from it were not even sought to be introduced by the State in the trial of the alleged robbers.

Morover, in determining whether or not the suggestive photographic identification procedure resulted in misidentification, we may properly consider the other factors which were before the jury and were properly admissible which tend to establish that there was not substantial likelihood of misidentification. *United States ex rel. Springle* v. *Follette*, 435 F.2d 1380, 1384 (2d Cir. 1970), cert. denied, 401 U.S. 980 (1971); *United States ex rel. Phipps* v. *Follette*, *supra* at 916-17; *Clemons* v. *United States*, 408 F.2d 1230, 1250-52 (D.C. Cir. 1968) (en banc) (Leventhal, *J.*, concurring, joined by now Chief Justice Burger), cert. denied, 394 U.S. 964 (1969).

In our examination of the State record we find other evidence which corroborates the identification and establishes that no violation of due process was present in the

Gonzalez' trial. There was evidence that Gonzalez had been an employee of the laundry which could account for his apparent familiarity with the location of the cashier's office,[8] his awareness that Friday (the day of the robbery) was payday for the route drivers (his job) and also would account for his wearing a mask while Castellano used no disguise.[9] Moreover, the general physical description of the masked robber fitted Gonzalez. More damning of course was the presence of both men in a car fitting the description of that driven to and from the laundry. Patrolman Guzzo who was on patrol shortly after 1:20 P.M. about one mile from the scene of the robbery observed Castellano[10] driving the car which at trial he identified as the one Gonzalez was driving just prior to his arrest. At about 2 P.M. the day of the robbery, Richard Phillips testified that both Gonzalez and Castellano came to his home and asked him to ride with them to Copiague. Castellano was then unshaven, the description given by those who viewed him on the robbery scene. Phillips further testified that while he and Gonzalez stopped at a diner Castellano went to a barber and then came back freshly shaved. The

[8] Although the cashier's office was up a flight of stairs and off a main office which had an unmarked door, no witness could recall directing the robbers to the cashier's office. Drivers of course would be aware of its location, since they had to make their reports in an office adjacent the cashier's office.

[9] It was just prior to the robbers' ascent of the stairs that Gonzalez donned his mask. While it was necessary for the drivers to visit the upstairs offices in order to make their reports, there was testimony at trial that they did not frequent the front offices occupied by Clarke and D'Amora; there was another entrance to the upstairs offices.

[10] While Guzzo could not identify Gonzalez as being the second man in the car, he described him as being heavyset and having brown hair.

three men were then observed driving in the blue Chevrolet by Detective Moran who identified Gonzalez as the driver and Castellano as a passenger. Gonzalez fit the description of one of the robbers 'male, white, early twenties, dark hair, heavy set and 5'10"'. When the police car moved up to the Chevrolet, Gonzalez was showed the police shield and first slowed down, then suddenly accelerated. Gonzalez ran out of the car but Castellano was arrested. The Suffolk County Police were then alerted and at about 3:25 Patrolman Shirvell observed Gonzalez stepping into an outdoor phone booth. Gonzalez again ran away and refused to stop when warned and kept running even when shots were fired. Assistance was called for and Patrolman Carter observed a man running who fit Gonzalez' description. After another chase and a struggle Gonzalez was finally handcuffed.

While no single circumstance here was damning, the accumulated circumstantial evidence in our view fully substantiated the fact that Mrs. D'Amora accurately identified Gonzalez. All of this evidence was before the jury. In our view Gonzalez was accorded due process and his conviction was proper and without constitutional taint.

The State argues that the Gonzalez confession although not complying with *Miranda*, was in fact voluntary and although inadmissible on trial, is admissible on this proceeding. This is a novel proposition not supported by any authority and was rejected by the court below. In view of the disposition we have made, we do not reach the point.

Reversed.

APPENDIX B

Report and Recommendation of United States Magistrate Goettel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
71 Civ 1535

UNITED STATES *ex rel.* MANUEL A. GONZALEZ,

Petitioner,

against

JOHN ZELKER, As Warden of Green Haven Prison at Stormville, New York,

Respondent.

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241. The petitioner is presently serving a sentence of 10 to 20 years for robbery in the first degree and five to ten years for grand larceny in the first degree and assault in the second and third degrees. Judgment of conviction following a jury trial in Nassau County Court was rendered on September 22, 1967. Petitioner is presently incarcerated at Green Haven Prison, Stormville, New York.

The judgment of conviction was affirmed by the Appellate Division without opinion (31 A.D. 2d 1006). The New York Court of Appeals affirmed the conviction (27 N.Y. 2d 53). A petition for a Writ of Certiorari was denied by the United States Supreme Court on January 11, 1971, (400 U.S. 996, 91 S. Ct. 470).

The facts involved in the conviction can be conveniently excerpted from the majority opinion in the New York Court of Appeals' decision:

Appendix B

"On March 18, 1966,* a robbery was committed in the offices of the State Laundry in Nassau County. At the trial, one Marguerite D'Amora the laundry receptionist, testified that on the day in question, she looked out the window and noticed a shiny blue car being parked in front of the office. Two men, whom she identified at the trial as the appellants Gonzalez and Castellano (the latter who was bearded at the time of the robbery), got out of the car. Gonzalez pointed a gun at her and said: "This is a stick up, come with me . . . you won't get hurt". Simultaneously, Castellano said: "Get up" and they took her and another employee (Kitty Clarke) up to the cashier's office on the next floor. On the way, Gonzalez remembered to put a mask on, but Castellano left his mask in his pocket. Prior to entering the cashier's office, appellants forced a third employee (Mrs. Pisciotto) out of a telephone booth and all were corralled into the cashier's office. Castellano kept a gun on the employees (including Kenneth Bloch, the office manager), while Gonzalez forced the cashier to open the safe. After cash and checks were removed, the two men fled.

The police were given a description of the men and their get away car. Patrolman Guzzo testified that he observed a light blue Chevrolet, operated by Castellano, not far from the laundry and that he had reported the license number (SK 8919) to police headquarters. Thereafter, other officers saw a blue Chevrolet (license SK 8918) driven by the bearded

* The uncorrected copy of the opinion, attached to the petition, erroneously gives the year as 1968, an error corrected in the published version.

> Castellano, but the car sped away when the police told them to stop. After a short chase, Castellano was arrested and Gonzalez, who had run away, was taken into custody later in the day."

This case is a rather dramatic example of a State prosecution being overrun by the advancing tide of Federal standards of criminal justice (as enunciated by the Supreme Court) with the ultimate resolution of the case being cast in doubt by an apparent slackening of the tide.

On the day of their arrests both defendant's gave complete, written confessions concerning their part in the robbery as a result of which relevant physical evidence (including cash) was recovered. The two laundry employees who had seen Gonzalez before he put on his mask were interviewed by the police. One, Kitty Clarke, was unable to identify either defendant. The other witness, Mrs. D'Amora, subsequently made an identification of Gonzalez under circumstances that will be described more fully hereafter. At this point it appeared that the District Attorney had an overwhelming case. Before the case could be called for trial, however, the Supreme Court rendered its decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1968), as a result of which the People stipulated to the inadmissability of the confessions. Then, shortly before the case was tried, the Supreme Court issued a series of opinions setting up requirements for pre-trial identification procedures involving lineups and showups, *United States* v. *Wade*, 388 U.S. 218; *Gilbert* v. *California*, 388 U.S. 263; *Stovall* v. *Denno*, 388 U.S. 293, (1967), which seriously inpinged the validity of identification testimony in this case. (While the case was pending on appeal, the Supreme Court also decided *Simmons* v. *United States*, 390 U.S. 377 (1968). What had been an air-tight case for the prosecution became a bramble patch of difficult legal questions.

Appendix B

The identification of the two defendant's differed greatly both in quantity and type, since Castellano had not worn a mask. The majority opinion in the New York State Court of Appeals (rendered by Judge Scileppi and concurred in by three other Judges) primarily concerned the "showup" with respect to defendant Castellano, and the questions raised by the various United States Supreme Court's decisions. Remarkably little of the opinion concerns Gonzalez and the sole identification of him by Mrs. D'Amora. The dissenting opinion of Chief Judge Fuld held that the pretrial identification procedures were prejudicial as to both defendants. The dissenting opinion of Judge Breitel agreed that the identification of Gonzalez was improper, but concluded that, as to Castellano, there was sufficient other evidence of his identity to render the identification procedure harmless as to him. Consequently, as to Gonzalez it was a four to two decision with Judge Burke taking no part.

It is clear that, as to Gonzalez, there would have been no conviction without Mrs. D'Amora's identification. Mrs. D'Amora testified that she had been at the switchboard by a window when she had seen the robber's car stop in front of the laundry (338*). She had never before seen the two men who entered the office, although she subsequently learned that Gonzalez had once been employed by the laundry (339, 346, 392). Minutes after entering the premises Gonzalez donned a mask (343-4, 391-6, 455-60). He stood a foot away from her and pointed a gun at her (343-4). Mrs. D'Amora suffered a severe shock from the incident, and was under treatment for this shock for a period of six months (369, 375). As a result of this she never made an

* The numbers refer to the pages in the trial transcript.

in person identification of either defendant until she saw them at the trial some 16 months later (400, 431, 435).

At the trial she testified to having no doubts as to her identification of Gonzalez (341), but it was clearly indicated that the description she gave of him immeditely following the robbery was totally in error (368, 372, 379, 380, 424-5). Her explanation for this was that she had been in shock and had had [4 (sic)] for transquilizers before speaking to the investigating officer (369). The fact remains, however, that at trial he could not recall how they were dressed, or whether Gonzalez had light or dark skin. She did not know how she described Gonzalez's hair color, although conceding that she might have misdescribed it, and was uncertain as to whether he had been wearing sun glasses. (377-380, 420-5). She was confronted with her own signed statement given shortly after the robbery, which misdescribed Gonzalez, and could not reconcile it with her trial testimony (848-60). In brief, the description given the police immediately after the robbery was confused.

Immediately followng the robbery, therefore, it appears questionable whether Mrs. D'Amora could have picked Gonzalez out of a proper lineup. Sometime thereafter, she testified before the Grand Jury. She was shown photographs of Gonzalez and Castellano and apparently identified them (404-5). The circumstances of this photographic identification are not contained in the record. She was shown the pictures again, shortly before she entered the courtroom to testify and to make her first in person identification. She did not indicate whether she could have identified Gonzalez after this long hiatus had she not been shown his picture on the prior occasions. She conceded knowing that defendants would be at counsel table sitting next to their attorneys. (410-12, 433-4).

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The dissenting opinions in the New York Court of Appeals seem to more accurately interpret a defendant's rights under the standards set by the United States Supreme Court. Any question in this regard would appear to have been disposed of by the recent Second Circuit decision in *Rivera* v. *McKendrick*, —F.2d—, (decided August 9, 1971, slip opinion #981). That case is quite similar to Gonzalez. As in this case, the initial confession by the defendant occurred before the Supreme Court's decision in *Wade*. However, Rivera's trial occurred before the trio of identification cases were decided by the Supreme Court, while the Gonzalez trial occurred shortly thereafter. Consequently, the standards to be applied to Gonzalez are, if anything, more stringent.

The governing principles which had previously applied in this Circuit are set forth in *United States ex rel Phipps* v. *Follette*, 428 F.2d 912, 914-15 (2d Cir. 1970), where it was held that:

> "[T]he required inquiry is two-pronged. The first question is whether the initial identification procedure was 'unnecessarily' [Stovall] or impermissibly [Simmons] suggestive. If it is found to have been so, the court must then proceed to the question whether the procedure found to have been 'unnessarily' or 'impermissible' suggestive was so 'conducive to irreparable mistaken identification' [Stovall] or had such a tendency 'to give rise to a very substantial likelihood of irreparable misidentification' [Simmons] that allowing the witness to make an in-court identification would be a denial of due process".

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In this instance so far as the records reveal the pretrial identification procedures were impermissibly suggestive in that only a single photograph was shown to Mrs. D'Amora. As Judge Lumbard states in his Rivera opinion:

> "The use of a single photograph is by itself a highly suggestive technique, and Vega's question was hardly that of an eyewitness sure of his identification. The record is not clear as to whether that showing preceded or succeeded the showing of a group of photographs to Vega, nor is it clear as to what was said about the photograph.
>
> * * *
>
> These are surely questions to be explored at the evidentiary hearing in determining the extent of the damage done to the incourt identification by these photographic sessions."

Respondent's counsel critizes the Rivera opinion indicating that the question of photographic identification had not even been raised before the New York Court of Appeals, and that the Second Circuit erred in failing to appreciate that the prosecution could not, under New York Law, develop the manner in which the identification had been made but that the defense was free to do so. The implication is that the failure of the defendant to inquire more deeply into the identification procedures on cross examination prevents him from raising the question on appeal or in a habeas corpus petition. The opinion in Rivera shows cognizance of this restriction on the prosecution, but does not find it controlling (see e.g. footnote 2 on Page 4577).

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This is not a case like *United States* v. *Famulari*,— F.2d— (2d Cir., decided August 19, 1971, slip opinion #1049, 1056), where the witness showed complete independence concerning the accuracy of a photographic identification made from numerous photographs and required a court room confrontation; nor is it a case like *United States ex rel Valentine* v. *Zelker*, —F.2d—, (2d Cir., decided July 15, 1971, slip opinion #1005), where there was an accurate description given immediately after the crime, rejection of the first suspect photograph tendered, and a direct identification within 24 hours after the crime. This is a case where 16 months elapsed between the crime and the first personal identification and, in the interim (so far as the record reveals), only photos of the defendants shown to the witness. As the Second Circuit stated in the *Phipps* case, *supra*, (at page 915):

> "Lapse of time between the crime and the confrontation is also important; the longer the initial image will have dimmed and that the second image will play a significant role. Also, a long interval between the initial observation and the trial coupled with an improper confrontation of a comparatively short time before the witness appears in court enhances the danger that he may be relying on his most recent encounter."

Respondent urges an additional reason for upholding the conviction. It is pointed out that, in determining whether the lineup was improper and due process violated, we must consider the "totality of the circumstance". If, they urge, the other evidence is sufficient to establish that the identification was correct and no prejudice re-

sulted from it then, even assuming the procedure was improper, the conviction should stand.

There was some evidence in addition to the identification by Mrs. D'Amora to implicate Gonzalez in the robbery. The observation by the police of a suspicious car in the neighborhood, the subsequent arrest of Gonzalez and Castellano in a car with a similar (one digit different) license plate*, and their flight, are corroboratory evidence. Standing alone, however, that evidence is not sufficient to support the conviction or to fortify the photographic identification. Respondent, therefore, urges that this court should consider the confessions given by the defendants. While conceding that the confessions are not admissible *per se*, respondent argues that collateral use may be made of them, relying upon *Harris* v. *New York*, 401 U.S. 222, 91 Sup. Ct. 643 (1971).

The *Harris* case certainly opens some holes in the *Miranda* barricade. (Indeed the possible effect of that case was suggested to counsel by the writer.) However, a careful reading of *Harris* seems to indicate that it is concerned with preventing defendants from using the Miranda rule as a sword rather than as a shield. The court relied heavily on *Walder* v. *United States*, 347 U.S. 62 (1954) which specifically distinguished the affirmative use of unlawfully obtained evidence from allowing a defendant to resort to perjurious testimony in reliance upon the government's disability to challenge his credibility. It does not follow therefore, that illegally obtained confessions can be used for *any* collateral purpose. The petitioner has

* No satisfactory explanation for the difference in the license plate numbers has ever been offered.

not attempted to make any affirmative use of his Miranda rights. To allow an invalid identification in evidence on the basis of an illegally obtained confession would be to make one good case out of two bad ones. Other problems aside, it would not appear that the co-defendant's confession could be used against Gonzalez, *Bruton* v. *United States*, 391 U.S. 123 (1968); *Roberts* v. *Russell*, 392 U.S. 293 (1968). Even if the confessions were to be considered, in support of the identification procedure, a hearing would be necessary in any event to determine whether they were voluntarily given and therefore admissable evidence. No "Huntley" hearing was had at the State Court trial since the confessions were not used.

Finally, respondent argues that the passage of the Omnibus Crime Control and Safe Street Act of 1968 (18 U.S.C. 3501-3502) has limited the application of the Supreme Court's created Miranda rule. It is sufficient to note however, that Section 3501, pertaining to admissibility of confessions, is not to be applied retroactively. *Sheer* v. *United States*, 414 F. 2d 122, (5th Cir 1969) *cert. den.* 396 U.S. 946 (1970). *United States* v. *Barber*, 291 F. Supp. 38 (1968). Moreover, it specifically pertains only to criminal prosecutions "brought by the United States or by the District of Columbia" and has no application in the state courts. *Commissioner* v. *Ware*, 265, A. 2d 790, 438 Pa. 517 (1970).

One can sympathize with the plaint of the prosecution that it has been caught in a whipsaw between the Miranda rule and the identification cases, and agree that the rules "are not to be applied in such a fashion as to constitute escape hatches for the guilty." *United States ex rel Beyer*

v. *Warden*, 436 F. 2d 755, 756 (2d Cir. 1971). However, we must take the law as it has been decided by the Appellate Courts and apply it in the spirit intended. Therefore, like the court in Rivera, we must state that:

> "We agree with Chief Judge Fuld's dissent in the New York Court of Appeals that the pre-trial identification procedures used by the police here were impermissibly suggestive and conducive to mistaken identification. While we cannot say, as a matter of law, that Vega and Vargas would not have been able to identify Rivera at trial without the aid of those previous and impermissible procedures, we believe that it is highly probable that the in court identification was so tainted. Hence, we must remand the case to the district court for an evidentiary hearing as to whether the witnesses' in court identification was based on the police's unnecessarily suggesitve prior procedures, in which case the use of such testimony would be a denial of due process, or whether the trial identification was independent of those pictures."

With respect to the remand, petitioner's counsel* urges that an evidentiary hearing is not the best method of approaching the present situation. It is argued that a hearing could not shed much light on the identification procedures after the passage of so much time. Taking a lead from

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* Petitioner has been ably represented in this proceeding by the Legal Aid Society of Nassau County who have continued to pursue his cause despite their distance from this district and without Criminal Justice Act assignment and compensation. They should be commended for their dedication and diligence.

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Judge Timbers concurring opinion in United States *ex rel Rivera* v. *McKendrick, supra,* at page 4581, which suggested that the writ of habeas corpus be granted unless the State granted petitioner a new trial within a stated period, as a means of placing the responsibility for determining whether the case should be retried where it belongs.

At present the records do not contain sufficient information to indicate whether or not the pre-trial photographic identification was so suggestive as to have deprived the defendant of due process at trial when the direct identification was made. (This is because of the New York exclusionary rule of evidence designed primarily for the benefit of the defendants.) Although, on the information presently available, there is a strong indication of prejudice, it might be that Mrs. D'Amora was originally shown a large number of photographs of persons of similar appearance at the time of the Grand Jury proceedings. If she independently selected Gonzalez's picture from this group, the fact that the picture was again shown to her some 16 months later, immediately before trial, would appear in a much better perspective—more like an instance of past recollection refreshed. In any event, this is something only an evidentiary hearing can determine.

Respectfully submitted,

GERARD L. GOETTEL
Gerard L. Goettel
United States Magistrate

Dated: New York, New York
September 24, 1971

APPENDIX C

Report and Recommendation of United States Magistrate Goettel, Dated May 17, 1972

By Order dated December 16, 1971, your Honor ordered that a hearing be held with respect to the application for a Writ of Habeas Corpus in this matter, and that I report my findings of fact and conclusions of law thereon.

In my report and recommendation dated September 24, 1971, I had indicated that the circumstances surrounding a photographic identification of Petitioner Gonzalez, by Mrs. D'Amora, were not revealed in the record but that there was a strong indication that the pre-trial photographic identification might have been so suggestive as to deprive the defendant of due process at trial when a direct identification was made. (Mrs. D'Amora was the sole witness who identified Gonzalez as one of the robbers since, unlike the co-defendant Castellano, he donned a ski mask shortly after entering the Laundry.) Consequently, the purpose of the hearing was to determine what events occurred between the day of the robbery when Mrs. D'Amora gave a description of Gonzalez having blonde hair and being 5'10", and the trial, 16 months later, when she identified Gonzalez, who has dark hair and is 5'8", as being one of the two persons who had robbed the Laundry.

The Evidence

After the trial, Mrs. D'Amora retired for reasons of health and moved to Virginia Beach. She was unable to attend the hearing. It was therefore necessary to obtain her deposition upon written interrogatories. In summary it may be said that she was unable to remember many of the facts and had a complete absence of memory concerning the

central problem of photographic identification; to use her words, "after all these years, how can I remember anything?" (7 & 14)*.

In brief her testimony was as follows: She cannot remember Gonzalez's description now, except to say that he was tall (2). Initially she stated that she could not remember whether she had seen photographs of the men who committed the robbery, but subsequently stated that she was sure she had and she thought she had seen them in the Grand Jury room. She was unable, however, to recall who had shown them to her (3). She does not know how many pictures were shown to her but it occurred in a room with people sitting there (3, 4 & 12). She first saw Gonzalez in person sixteen months after the robbery when she saw him walking into the court room on the day of the trial while she was sitting in the corridor (5 & 14). She was shown guns and clothing by police officers after the arrest of the defendants but she does not know whether this was before or after she was shown photographs (12-13). She stated she was unable to remember whether she was shown photographs immediately prior to testifying at trial (13). She was totally unable to recall whether she had made a photographic identification (14). She still continues taking medication as a result of a nervous condition from which she has suffered since the time of the robbery (8). (She did state, as her conclusion, that she had given a correct identification at trial and she could have identified Gonzalez even if she had not seen photographs (4-5)).

The testimony of the other witnesses was equally vague. They contradicted each other, their prior testimony, and

* The numbers refer to pages in the deposition, Court's Exhibit #2.

at times, even their own testimony at the hearing. I find, however, that all of these witnesses were attempting to testify honestly, but that the extensive lapse of time (5 to 6 years) had so dimmed their memories so as to now make any accurate recollection difficult. The most extreme of these was Detective Sheehan who took a statement from Mrs. D'Amora after the robbery. He had no independent recollection of the events. (Transcript p. 140). The Assistant District Attorney who had presented the case to the Grand Jury in Nassau County, Frank Dillon, by stipulation, had his testimony submitted by affidavit. He stated, with respect to the crucial issue of photographic identification, that he had "no independent recollection of any discussions with witnesses prior to their testifying before the Grand Jury [but] . . . from past experience believes that no such discussions were held". (Last document in Respondent's Affidavit.)

The detectives who were in charge of the case testified that they never showed photographs to Mrs. D'Amora and that they did not confer with the witnesses before their Grand Jury appearances. Detective Howard Herald, before the Grand Jury, identified photographs of both defendants (this was a reverse identification—i.e., he testified that the photographs were of the persons who had been arrested for the crime). From the Grand Jury transcript, it appears that Mrs. D'Amora was shown one photograph of each of the defendants in the Grand Jury and identified Grand Jury Exhibit 1 (identical to Exhibit B1 in this hearing) as being the defendant Gonzalez (Exhibit J, page 33). From the totality of all of the other evidence heard, it would appear that this was the first time that she had ever been shown any photographs of the suspects. At the time

she was shown the photograph of Gonzalez she had already testified as to the entrance of the defendants into the laundry, and their initial threats to her. She was not asked to identify the photograph from a group of photographs, and under the circumstances it must have been readily apparent that the photograph she was being shown was of the defendant, who had been arrested a couple of months earlier.

Detective Moran, who assisted the prosecution at the trial, and the Assistant District Attorney who tried the case, Robert W. Shebar, testified as to the pre-trial preparation. A day or so before trial they met with the witnesses. There were at least three of them at least two of whom were women. They were brought into the attorney's office and he was sitting at his desk and had in front of him each of the photographs of the defendants that had been used before the Grand Jury. When the witnesses came in, they had a brief discussion with him and he said, in substance, "I am going to show you some photographs and ask you if you can recognize the persons in the photographs" (p. 9, transcript). The Assistant District Attorney stated that he did not know whether the witnesses had seen the photographs before, but that, if they testified before the Grand Jury, they would have seen them some 14 months earlier. The Detective stated that the older woman studied the photographs longer refreshing her recollection. (Neither of these witnesses could state with certainty that Mrs. D'Amora was one of these witnesses, but from all of the evidence I conclude that she was, and that she was the "older woman" who studied the photographs a little longer.)

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Detective Moran acknowledged that Mrs. D'Amora was extremely nervous following the robbery, which may account for her having described the petitioner as being blonde. My viewing of the petitioner at the hearing showed that he had such extremely dark brown hair as to be the color usually referred to as black, or even jet black.

Findings of Fact

Based on the foregoing,* I make the following findings of fact:

1. When the State Laundry was robbed on March 18, 1966, only two witnesses saw the face of the robber, who is alleged to be Manuel Gonzalez, before he donned a ski mask which covered his face.

2. One of these witnesses, Kitty Clarke, stated at all times that she was unable to identify the perpetrators of the crime.

3. The only remaining person who saw the defendant identified as Gonzalez, Marguerite D'Amora, was in a highly nervous state following the robbery *and gave a description that does not accurately describe Gonzalez.*

4. Mrs. D'Amora made no further identifications until two months later when, before a Nassau County Grand Jury, she identified a photograph of Gonzalez as being one of the robbers.

5. The circumstances of the showing of the photograph before the Grand Jury was such as to virtually compel an identification by Mrs. D'Amora.

* These findings of fact are also based on aspects of the trial testimony which are not disputed.

6. Mrs. D'Amora again saw a picture of Gonzalez in August of 1967, a day or so prior to the trial, when she was again shown a single photograph of him: the same photograph that she had been shown before the Grand Jury.

7. The first time that Mrs. D'Amora saw Gonzalez in person following the robbery was at the trial, 16 months later, when she saw him entering the court immediately prior to her testimony and her first in person identification.

8. I conclude, therefore, that the trial identification was influenced substantially by the showing of the single photograph to Mrs. D'Amora before the Grand Jury, and again in trial preparation immediately before testifying, and that it would have been difficult for her to separate the memory of the man she had seen for a few minutes some 16 months earlier, from the photograph she had been shown twice in the intervening period.

Legal Issues

It is clear, as a proposition of law, that the photographic identification in this matter was impermissibly suggestive. As the Supreme Court said in *Simmons* v. *United States*, 390 U.S. 377, 383-4 (1968):

> "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identifica-

tion. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the *initial* identification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." (footnotes omitted).

This case is similar in many respects to *United States* v. *Gambrell*, 449 F.2d 1148 (D.C. Cir. 1971) where the court said, at 1153:

> ". . . and impermissibly suggestive photographic display should be considered to give rise to a very substantial likelihood of irreparable misidentification if the government is unable to show, by clear and convincing evidence, that a subsequent in-court identification is based on a source independent of the photographic display.
>
> * * *
>
> [The witness] knew that the persons depicted had been arrested, indicted and were awaiting trial for crimes which occurred involving her . . . Moreover, her prior description of the assailants was none too detailed . . . Under such circumstances, the

photographs were suggestive to an impermissible degree." (footnotes omitted).

The court also noted that the witness's opinion that the photographic display had not influenced her in-court identification was not conclusive. *United States* v. *Gambrell*, 449 F.2d at 1154. See also *United States ex rel Rivera* v. *McKendrick*, 448 F.2d 30 (2d Cir. 1917); *United States ex rel Phipps* v. *Follette*, 428 F.2d 912 (2d Cir. 1970).

Procedures such as those used in this case were cogently condemned in an article by Surrogate Nathan Sobel in the New York Law Journel on December 28, 1971 at 1 and 3. The article, sixth of a series of ten dealing with "Identification: Legal and Practical Problems", had the following to say with respect to photographic identification:

> "What begins as a permissible procedure ends with one which is surely suggestive. Of what purpose is a lineup with counsel present when the witness has already viewed a photograph of the suspect? It is certain that the witness will retain the image of the photo. There will be few instances where the witness will fail to identify the person most recently viewed in the photo.
>
> * * *
>
> After the defendant has been charged or indicted on probable cause, then photo identification procedures are vulnerable for all the reasons discussed at the custody state, plus many more. Generally such procedures are employed for the express purpose of 'prompting' the witness testimony at the preliminary hearing or trial. The latter is a prac-

> tice which the courts do not 'condone' (*David* v. *United States*, 425 F.2d 673) but do not find 'unfair' (*United States* v. *Fitzpatrick*, 437 F.2d 19; *United States* v. *Sartain*, 422 F.2d 387; *People* v. *Gonzalez*, 27 N.Y. 2d 53, 58).
>
> * * *
>
> Unlike corporeal showups, no exigent circumstances can ever justify the suggestive procedure of exhibiting a single photo.".

With respect to this case (and the decision of the New York Court of Appeals) Surrogate Sobel wrote at 3, col. 3:

> "In re *Gonzalez* (*supra*) (Judge Fuld dissenting) the witnesses were shown photographs of the defendants immediately before trial. The court stated: 'The District Attorney has a right to prepare his witnesses prior to trial and neither the Federal or State Constitution require him to do so in the presence of counsel.' This is an accurate statement if it refers to the right of counsel at photo procedures (discussed, *infra*). But 'preparing' witnesses and 'prompting' witnesses are two separate things! Our district attorneys are aware of the difference (*People* v. *Santiago*, 31 A.D. 2d 627). Where identification is the sole issue they bear a heavy ethical burden."

Respondent tacitly concedes that, in vacuo, the identification procedures would be considered impermissible under the Federal standards announced after arrest and shortly prior to trial. They emphasize, however, that not only could they not foresee this change in the law, but that the

identification seemed inconsequential in light of their other evidence, particularly the confession they had obtained from Gonzalez. Of course, the confession was rendered inadmissible by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), leaving the prosecution in a most unenviable position.*

Respondent now argues that the Supreme Court of the United States has rectified the unfairness of the application of the *Miranda* rules to certain cases, citing *Williams* v. *United States*, 401, U.S. 646 (1971) and *United States* v. *White*, 401 U.S. 745 (1971), as well as the concurrent decisions in *Desist* v. *United States* and *Kaiser* v. *New York*, 394 U.S. 244 and 394 U.S. 280 (1969). Hence, it is contended, the confession should now be admissible.

Undoubtedly there has been some increased appreciation of the problems in the practical administration of justice caused by affording retroactive effect to Supreme Court rulings that overturn existing standards. As the court stated in *Jenkins* v. *Delaware*, 395 U.S. 213 (1969), p. 218, footnote 7:

> "Our initial approach to prospective decision making has undergone some modifications".

It is contended that the existing rationale is that there is no inflexible constitutional rule requiring absolute retroactivity and that the consideration is whether retroactivity will further or hinder operation of the new rule. If the

* Nothing in this report should be construed as being in any way critical of the State law enforcement authorities who were acting, at all times, in conformance with the law as they then understood it. During the course of these hearings, the Nassau County District Attorneys' Office, appearing on behalf of the respondent, has been completely cooperative in assisting this court in performing its functions under the Great Writ.

purpose of the new rule is deterence of improper police procedures, then there is no reason for making it retroactive, but if the purpose is for improved truth finding, then the retroactive effect is called for, *Williams* v. *United States*, 401 U.S. at 653. A further refinement of this rationale seems to be that, if neither a truth finding effect nor correctional procedure effect is involved, then the burden on the administration of justice can be considered. *Desist* v. *United States*, 394 U.S. at 251. See also *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967). The absence of any fixed criteria can be appreciated by reading the various opinions in the recent case of *Adams* v. *Illinois*, 403 U.S. 278 (1972).

The Supreme Court's change of heart began with *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), which gave only a partial retroactive effect to the *Miranda* rule, applying it to those cases which had not been tried as of the date of *Miranda* decision. While the *Johnson* decision attempted to limit the practical problems created for the states by the *Miranda* ruling, they did leave a few cases in a difficult position:

> "Implicit in this choice was the assumption that, with few exceptions, the commission and investigation of a crime would be sufficiently proximate to the commencement of the defendant's trial that no undue burden would be imposed upon prosecution authorities by requiring them to find evidentiary substitutes for statements obtained in violation of the constitutional protections afforded by *Miranda*." *Jenkins* v. *Delaware*, 395 U.S. at 219-220.

This is one of those "few exceptions" spoken about in the *Jenkins* case. It is undoubtedly true, as the late Justice

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Harlan pointed out in his dissenting opinion in the *Jenkins* case, that the Supreme Court decisions with respect to retroactivity have proceeded on an "ad hoc" basis, that the decision in *Jenkins* is inconsistent with *Johnson*, and that a fresh look at the whole problem is necessary. However, even Justice Harlan conceded that the *Johnson* decision has not been overruled and, considering the amount of time that has passed, there would not seem to be any remaining purposes in overruling *Johnson*, since most, if not all of those case in which a confession had been obtained before the date of the *Miranda* decision, have now been tried. Consequently, while it may be true that the present Supreme Court would not have placed the prosecuton in the situation in which it finds itself with respect to *Gonzalez*, the fact remains that the *Johnson* opinion did place them in such a position, and the case was tried on the assumption that *Miranda* excluded the confession.

Even if the Supreme Court had in the interim overruled *Johnson*, it would not seem to have any effect upon the present posture of this Petition for a Writ of Habeas Corpus. Initially, it should be observed that there has never been a hearing as to the voluntariness of the confession. Moreover even if on a re-trial the confession might be admissible, the fact is that this conviction was obtained on the basis of improper identification testimony, and not upon the confession:

> "Due to process forbids that, when an issue of fact is presented, a man should be sent to prison without the trier of the facts having seen and heard his accusers and himself, if he desires to testify, and weighing their credibility in the light of their de-

meanor or the stand. We would thus reach no different conclusion in this case if Graham had not been constitutionally entitled to a jury trial. It would still be for the judge who saw and heard the witnesses at the trial, or better, another judge who would see and hear them without having been exposed to the illegal evidence, to determine where the truth lay—not for appellate judges reading a cold record." *United States ex rel Graham* v. *Mancusi*, F.2d (2d Cir., slip opinion 378, at 1603-4, decided January 28, 1972). See also *United States* v. *Gambrell, supra.*

The abstract guilt or innocence of the relator is not at issue. It is a simple question of whether his constitutional right to due process was violated by his conviction that is presented by this Habeas Corpus petition. *Curren* v. *State of Delaware*, 259 F.2d 707 (3d Cir. 1958), *cert. denied*, 358 U.S. 948 (1959); *Wagenknecht* v. *Crouse*, 344 F. 2d 920 (10th Cir. 1965); *Fulford* v. *Dutton*, 380 F.2d 16 (5th Cir. 1967).

If the confession had been introduced at trial it is possible that, combined with the other evidence available, we might conclude that the identification was sufficiently corroborated that the suggestiveness of the photographic showing could be ignored, *United States ex rel Cummings* v. *Zelker*, 455 F.2d 714 (2d Cir. 1972). Such, however, is not the case. Of course, no opinion is expressed as to whether a conviction would have been obtained on the admissible evidence introduced by the State at trial.

Appendix C

Conclusions of Law

Consequently, I reach the following legal conclusions:

1. The photographic identification was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification, *Simmons* v. *United States, supra; Rivera* v. *McKendrick, supra.*

2. The prosecution failed to sustain its burden of demonstrating by clear evidence that the in-court identification was based upon observations of the defendant other than the improper confrontations, *United States* v. *Wade,* 388 U.S. 218 (1967).

3. The existence of the confession, which was not offered in evidence at the trial, affords no grounds for upholding the conviction, *United States* v. *Johnson, supra; United States ex rel Graham* v. *Mancusi, supra;* and *United States* v. *Gambrell, supra.*

CONCLUSION

I conclude therefore that the Writ of Habeas Corpus should be granted unless within 30 days after the entry of an Order the People bring the Relator to trial again.

Respectfully,

GERARD L. GOETTEL
United States Magistrate

Dated: New York, New York
May 17, 1972

APPENDIX D

Order of Cooper, *D.J.*, Appealed From

(DOCUMENT NO. 15)

UNITED STATES *ex rel.* MANUEL A. GONZALEZ,

v.

JOHN ZELKER, Warden of Green Haven Prison at Stormville, New York.

71 Civ. 1535

We approve in all respects the Report and Recommendation (dated May 17, 1972) and accompanying letter (dated May 16, 1972) of United States Magistrate Gerard L. Goettel (herein made part of the record). Apart therefrom, there is a substantial legal basis (impermissibly suggestive identification procedure) for granting the writ.

By letter dated June 8, 1972 counsel for petitioner advised us there would be no response to the objections interposed by respondent to the Magistrate's Report.

Respondent shall unconditionally release the petitioner from confinement unless within sixty (60) days from the date hereof the respondent shall proceed to retry him. If respondent elects to appeal from this disposition, this order shall be stayed upon the filing of a notice of appeal, pending the mandate of the Court of Appeals for the Second Circuit.

Settle order on three (3) days notice.

New York, N.Y.
June 19, 1972

IRVING BEN COOPER
U.S.D.J.

APPENDIX E

Court's Exhibit 2

(Deposition of Mrs. Marguerite D'Amora)

(Depositions in the matter of UNITED STATES OF AMERICA ex rel. MANUEL GONZALEZ, taken at Norfolk Virginia, April 11, 1972 at 2:30 P.M. Recorded on Tandberg Recording Tape 78, Side 2, Point 0—391.)

THE COURT: This is the matter.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
MANUEL GONZALEZ,

Relator,

against

JOHN ZELKER, Warden
Green Haven Correctional Facility,

Respondent.

PLEASE TAKE NOTICE that upon the affidavit of Joseph A. DeMaro, Assistant District Attorney of the County of Nassau, upon the consent of counsel for the relator, and upon the interrogatories annexed hereto (submitted by both attorney for relator and attorney for respondent), the District Attorney of the County of Nassau, attorney for the respondent herein, will cause the taking of depositions upon the annexed written interrogatories of the witness, Marguerite D'Amora, 4825 Conestoga Road, Virginia Beach, Virginia (Telephone No. 703-499-6368).

Appendix E

The above described deposition is to be taken by the Hon. Gilbert R. Swink, United States Magistrate for the United States District Court, Eastern District of Virginia, on the 11th day of April, 1972, at 2:30 o'clock in the afternoon of that date, at the United States District Court House for the Eastern District of Virginia, located in the Post Office Building, Grandby and Brambleton Avenues, in the City of Norfolk, Virginia (Zip 23510) or at such other time and place as shall be determined.

PLEASE TAKE FURTHER NOTICE that the District Attorney of Nassau County shall cause a certified copy of these here presents to be served upon the Clerk of the United States District Court for the Eastern District of Virginia so that a subpoena might issue to command the presence of the witness above described for the taking of said depositions.

Respectfully submitted,

WILLIAM CAHN
District Attorney
Nassau County
County Court House
Mineola, N.Y.

The subpoena was issued. It was served upon you, and you, Marguerite D'Amora, are here. It is agreed to by both parties that these depositions be taken, the questions will be propounded to you, and you will answer them to the best of your ability. You are Marguerite D'Amora?

Mrs. D'Amora: I am.

The Court: Will you please stand and hold up your right hand? Do you solemnly swear that the answers you give to these questions propounded will be the truth, the whole

truth, and nothing but the truth, to the best of your knowledge and belief, so help you God?

Mrs. D'Amora: I do.

The Court: Have a seat.

As to the first man: did you get a clear, full view of his face in the reception room?

Mrs. D'Amora: I don't remember, now it's been too long, but I know that he walked to my switchboard and he was tall—I would say tall—I can't remember his description now.

The Court: All right. Did you get a clear, full view of his face in the reception room? (pause)

Not as to his identity, but did you see him well?

Mrs. D'Amora: Yes. He was by—he came to my switchboard.

The Court: All right, I believe the answers that question. Was the lighting in the reception room adequate to observe the facial characteristics of this man?

Mrs. D'Amora: It was.

The Court: Do you remember seeing photographs of either of the persons who committed the robbery?

Mrs. D'Amora: I don't remember.

The Court: Before you testified in the Grand Jury? (pause) Did you see such pictures?

Mrs. D'Amora: I don't remember.

The Court: During your testimony in the Grand Jury? Did you see pictures?

Mrs. D'Amora: Yes, I think I did.

The Court: Before you testified at the trial?

Mrs. D'Amora: Yes, I think I did.

The Court: In the District Attorney's office?

Mrs. D'Amora: I don't remember if it was in the

District Attorney's office, or where it was that they showed me pictures.

The Court: All right. The next question is, at any time? Did you see pictures?

Mrs. D'Amora: Yes, I'm sure I did.

The Court: If you do remember any such incident, would you describe what you remember about it including who the person was who showed the picture? (pause)

Mrs. D'Amora: I don't know who it was.

The Court: How many pictures were shown?

Mrs. D'Amora: There was a picture of a car shown.

The Court: Do you kow how many pictures were shown to you? (pause)

Mrs. D'Amora: I don't know. I don't remember.

The Court: Who was portrayed in those pictures?

Mrs. D'Amora: I don't remember that either.

The Court: What was said to you by the person exhibiting the photographs?

Mrs. D'Amora: I don't remember that.

The Court: And, who else was present at that viewing?

Mrs. D'Amora: I was in a room, and there seemed to be a few people sitting out there.

The Court: You do not know any of the names?

Mrs. D'Amora: No, I don't.

The Court: Or their positions—whether they were police officers of who they might have been?

Mrs. D'Amora: I don't remember.

The Court: When you testified at the trial and identified Manuel Gonzalez as the man who approached you at the switchboard and eventually put on the ski mask, were you positive, in fact, that he was that man?

Mrs. D'Amora: Yes, I was.

The Court: Are you positive today that your identification of Manuel Gonzalez was correct?

Mrs. D'Amora: At the time I identified him, I made my identification as what happened in the office.

The Court: Are you positive today that the identification that you gave in the trial is correct?

Mrs. D'Amora: Yes.

The Court: Did anything that occurred between the time of the crime and the time you testified at the trial influence you in making an identification of Manuel Gonzalez?

Mrs. D'Amore: There wasn't.

The Court: No?

Mrs. D'Amora: No.

The Court: If you had not seen any photographs of Gonzalez between the time of the crime and the time you testified at trial, would you have been able to identify him?

Mrs. D'Amora: To the best of my knowledge, as of the day he walked into my office, yes.

The Court: All right. Did you see either of the two men who committed the robbery in the courthouse prior to your testifying at the trial?

Mrs. D'Amora: I'm sorry, would you repeat that?

The Court: Did you see either of the two men who committed the robbery in the courthouse prior to your testifying at the trial? (pause) In other words, did you see them before you went on the witness stand to identify them?

Mrs. D'Amora: Yes, I did. They were walking and I was sitting in the corridor—and they were walking in—on the other side of the room.

The Court: Could you have identified Gonzalez in court if you had not seen his photograph in the Grand Jury?

(pause) I'll repeat that question. Could you have identified Gonzalez in court if you had not seen his photograph in the Grand Jury?

Mrs. D'Amora: Yes.

The Court: Could you have identified Gonzalez in court if you had not seen his photograph prior to testifying at the trial?

Mrs. D'Amora: Yes.

The Court: Did seeing Gonzalez' photograph in the Grand Jury influence your identification of him at the trial?

Mrs. D'Amora: No.

The Court: Did seeing Gonzalez' photograph prior to your testimony influence your identification of him at the trial?

Mrs. D'Amora: No.

The Court: If you had not seen any photographs of Gonzalez, would you have been able to identify him at the trial?

Mrs. D'Amora: At that time, yes.

The Court: What is your name and present address?

Mrs. D'Amora: Marguerite D'Amora, 4825 Conestoga Road, Virginia Beach.

The Court: On March 18, 1966, where did you live?

Mrs. D'Amora: 1020 N. Broom Street, Lindenhurst.

The Court: On March 18, 1966, where did you work?

Mrs. D'Amora: State Laundry and Cleaners, Hempstead.

The Court: At what time did you report for work on that day?

Mrs. D'Amora: 7:30.

The Court: Were you ill on that day?

Mrs. D'Amora: No.

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The Court: Had you taken any medication on March 18, 1966 before the occurrence of the robbery?

Mrs. D'Amora: No.

The Court: What kind of medication and how much?

Mrs. D'Amora: None.

The Court: For what condition were you taking the medication? (pause) Your answer is that you were taking no medication, is that correct?

Mrs. D'Amora: That is correct.

The Court: Do you have a clear recollection of the robbery which occurred at the State Laundry in Hempstead, New York, on March 18, 1966? (pause)

Mrs. D'Amora: If you mean, uh, a clear recollection of someone—two men walking into the office, and one coming to my switchboard and pulling a gun and said, "This is a hold-up"—or "stick-up" whichever it may have been, that's—

The Court: They're speaking here of clear recollection of the robbery, they're speaking of identification also. At that time, did you have a clear recollection of the robbery?

Mrs. D'Amora: Oh, yes.

The Court: Has anyone from the Nassau County District Attorney's Office, or any other law enforcement agency discussed this case with you since the trial in 1967?

Mrs. D'Amora: No, I did not.

The Court: If so, who discussed the case with you?

Mrs. D'Amora: No one.

The Court: When did discussion take place?

Mrs. D'Amora: At no time.

The Court: Where did the discussion take place?

Mrs. D'Amora: Nowhere.

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The Court: Please repeat the contents of the discussion. There was no discussion, you say?

Mrs. D'Amora: No discussion.

The Court: The only thing you know is that sometime in January you were contacted—

Mrs. D'Amora: —by the District Attorney's office to see if I would go up to—if I was able to go to Nassau County to testify—that the case was coming up again. And I said "No".

The Court: Then you did not discuss the case with anyone, the facts of the case, at that time?

Mrs. D'Amora: The only thing I said, after all these years, how can I remember anything?

The Court: All right. Have you read any of your statements or testimony in this case since the trial?

Mrs. D'Amora: No.

The Court: When, or where?

Mrs. D'Amora: At no time.

The Court: Have you discussed any of your statements or testimony in this case since the trial?

Mrs. D'Amora: No, I haven't.

The Court: All right, as to when, where and with whom, the answer then would not at any place, is that correct?

Mrs. D'Amora: That's right.

The Court: Do you feel that the passage of almost six years has diminished your abiilty to recall the events of March 18, 1966? (pause)

Mrs. D'Amora: Yes, I think it does.

The Court: Do you feel that your physical illness which resulted from the crime diminished your ability to remember the details of the robbery?

Mrs. D'Amora: I don't think so.

The Court: The Court notes that she was shaking her head in the negative before she answered that question.

Do you feel that your present physical illness has lessened your ability to recall the robbery?

Mrs. D'Amora: Time has lessened my ability to recall the robbery.

The Court: But not your illness?

Mrs. D'Amora: Not my illness.

The Court: In your trial testimony in August, 1967, you indicated that the crime caused you serious upset and illness; during the five years since the trial, has the crime continued to cause you physical or psychological discomfort?

Mrs. D'Amora: Yes, it has.

The Court: Are you presently under any medication?

Mrs. D'Amora: Yes, I am under medication.

The Court: What is the medication?

Mrs. D'Amora: It's stomach tranquilizers and pressure pills.

The Court: When did you last take the medication?

Mrs. D'Amora: Oh, about a month—

The Court: A month ago?

Mrs. D'Amora: Yes.

The Court: For what condition are you taking the medication?

Mrs. D'Amora: I had high blood pressure and nervousness, a hiatus hernia.

The Court: All right. During and immediately after the robbery, what medication did you take?

Mrs. D'Amora: Something to quiet me down.

The Court: What was the specific kind of medication?

Mrs. D'Amora: I think the medication was phenabarb.

The Court: How much of it did you take, and over what period of time?

Mrs. D'Amora: Whenever I thought it was necessary, for my nervous condition.

The Court: And for what period of time?

Mrs. D'Amora: Well, the robbery upset me to a point that I was ill for about a year, anticipating, while I was employed at the same place, that someone else was going to come in and do the same thing.

The Court: Well, did you take this medication over a year period, or a month period, or—

Mrs. D'Amora: Only when it was necessary.

The Court: How soon after the robbery did you first speak to a law enforcement officer or representative of the District Attorney's Office about the events of the robbery?

Mrs. D'Amora: I don't remember.

The Court: What was the officer's name, if you recall?

Mrs. D'Amora: I don't remember.

The Court: Describe him, if you can.

Mrs. D'Amora: I can't do that either.

The Court: What was the nature of your conversation with him?

Mrs. D'Amora: I didn't have any.

The Court: You had no conversation with any law enforcement officer, that is policeman or representative of the District Attorney's office?

Mrs. D'Amora: Oh, yes, I had—they questioned me. Who it was, I do not know.

The Court: When was it, in relation to the robbery? The same day, or the next day, or when?

Mrs. D'Amora: I know there were police officers in the office the same day as the robbery.

The Court: And what was the nature of your conversation with them?

Mrs. D'Amora: They questioned me and they asked—whether their questions—I answered—I answered.

The Court: Was the first officer you spoke to after the crime, the same officer who wrote down your statement about the crime?

Mrs. D'Amora: I don't remember that.

The Court: If not, please give the name and description of the officer to whom you gave your statements.

Mrs. D'Amora: I don't remember that.

The Court: How soon after the robbery did you speak to the officer who wrote down your statement?

Mrs. D'Amora: Sometime in the afternoon after the robbery. I don't remember the exact time.

The Court: And what time was the robbery?

Mrs. D'Amora: After 1:00.

The Court: In the afternoon?

Mrs. D'Amora: In the afternoon.

The Court: Then in that same afternoon you spoke to the officer who wrote down your statement?

Mrs. D'Amora: That's correct.

The Court: Do you remember the contents of the statement you gave to police officers?

Mrs. D'Amora: No, I don't.

The Court: If so, please repeat it to the best of your ability?

Mrs. D'Amora: No, I don't.

The Court: Yes, Mam?

Mrs. D'Amora: I remember a car turned around—

The Court: This is what you told the police officers?

Mrs. D'Amora: I'm sure it must be.

The Court: All right.

Mrs. D'Amora: A car turned around and two men got out. One, the taller of the two, come over to me and took out a gun and said, "This is a hold-up, take me to the cashier". That's it. That's what I told them.

The Court: How did you describe the perpetrators of the robbery to the officer who took your statement? Their facial features, their dress, or anything else?

Mrs. D'Amora: I don't remember now what they had on. I couldn't remember now. I only know that one was taller than the other, and the one that had me—that took me out of the seat on my switchboard and put me in the hallway, that the short fellow standing there about a foot away from me, standing right there. He told me to keep quiet.

The Court: Did you give a description of the robbers to anyone else, other than the police officers?

Mrs. D'Amora: No, I didn't.

The Court: If, so, to whom did you give another description? When did you give it, and what was that description?

Mrs. D'Amora: I don't remember.

The Court: On the afternoon of the crime, did anyone show you any photographs of men to determine whether you could identify the robbers from photographs?

Mrs. D'Amora: No.

The Court: If so, how many photographs were shown to you?

Mrs. D'Amora: None.

The Court: Who showed the photographs to you?

Mrs. D'Amora: No one.

The Court: What did the person who showed the photographs say to you, if anything?

Mrs. D'Amora: No one said anything.

The Court: Was anyone else who was present at the robbery also present when these photographs were shown to you?

Mrs. D'Amora: No.

The Court: If so, who was present? That would be no one there?

Mrs. D'Amora: No one.

The Court: Did that person identify anyone from the photographs? If so, who did he identify?

Mrs. D'Amora: No one.

The Court: Did that person make his identification before you made any identification, or after?

Mrs. D'Amora: No, no one.

The Court: What did that person say when he made his identification.

Mrs. D'Amora: No one said anything.

The Court: Did you identify anyone from the photographs? If so, whom did you identify?

Mrs. D'Amora: I don't remember.

The Court: Describe the people depicted in the other photographs, if any, which you did not select.

Mrs. D'Amora: There wasn't any.

The Court: After the day of the crime, when did you next discuss the case with any law enforcement officers or representatives of the District Attorney's office?

Mrs. D'Amora: I don't remember that.

The Court: With whom was the discussion: (name or description)

Mrs. D'Amora: There was no one.

The Court: Where did the discussion take place?

Mrs. D'Amora: I don't remember.

The Court: At that time, were any photographs shown to you to identify the perpetrators? If so, how many?

Mrs. D'Amora: I don't remember.

The Court: You do not remember how many photographs were shown to you?

Mrs. D'Amora: No, I don't.

The Court: Who showed the photographs to you?

Mrs. D'Amora: No, I don't.

The Court: Or what the person who showed the photographs said to you, if anything?

Mrs. D'Amora: No. I don't.

The Court: Was anyone else who was present at the robbery also present when these photographs were shown to you?

Mrs. D'Amora: I don't remember.

The Court: And if so, who was present?

Mrs. D'Amora: I don't remember.

The Court: Did that person identify anyone from the photographs? If so, who did they identify?

Mrs. D'Amora: I don't remember that.

The Court: Did that person make his identification before you made any identification, or after?

Mrs. D'Amora: I don't remember that.

The Court: On May 12, 1966, did anyone show you any physical evidence, such as clothing, masks or guns?

Mrs. D'Amora: I don't know the date, but a detective or police officer came to our office and showed us guns, etc.

The Court: What, if anything, were you able to identify?

Mrs. D'Amora: I don't remember what I identified at this time.

The Court: When were these items shown to you: before or after the photographs were shown to you?

Mrs. D'Amora: I'm not sure if it was before or after.

The Court: Do you recall meeting with an Assistant District Attorney on the morning you first testified at the trial, August 10, 1967?

Mrs. D'Amora: I spoke to someone, whom he was I do not—I don't remember.

The Court: And you discussed the matter with him at that time?

Mrs. D'Amora: If there was questions asked, at that time when someone spoke to me, I must have spoke to him —I don't remember that.

The Court: Please describe and give the name of the Assistant District Attorney who was present at that meeting.

Mrs. D'Amora: I don't remember his name.

The Court: Who else, aside from yourself and the Assistant District Attorney, was present at that meeting on August 10, 1967?

Mrs. D'Amora: I don't remember who was with us.

The Court: Were any photographs shown to you at that meeting?

Mrs. D'Amora: I don't remember that.

The Court: Do you remember how many photographs were shown to you?

Mrs. D'Amora: I dont' remember that.

The Court: Or who showed them to you?

Mrs. D'Amora: I don't remember that. The only thing that I remember is, when I was on the stand, they showed me, not at the trial, on the stand, in the—

The Court: Grand Jury, maybe?

Mrs. D'Amora: The people were sitting around—they showed me a photo of a car. I don't remember anything—

The Court: What did the person who showed the photographs say to you, if anything?

Mrs. D'Amora: I don't remember.

The Court: Was anyone else who was present at the robbery also present when these photographs were shown to you?

Mrs. D'Amora: I don't remember that.

The Court: If so, who was present?

Mrs. D'Amora: No, I don't remember.

The Court: Did that person identify anyone from the photographs? If so, whom?

Mrs. D'Amora: I don't remember.

The Court: Did that person make his identification before you made any identification, or after?

Mrs. D'Amora: I don't remember that.

The Court: What did that person say when he made his identifiaction?

Mrs. D'Amora: I don't remember.

The Court: Did you identify anyone from the photographs? If so, whom?

Mrs. D'Amora: I don't remember.

The Court: Describe the person depicted in the other photographs, if any, which you did not select.

Mrs. D'Amora: I don't remember.

The Court: Subsequent to March 18, 1966, when did you first see in person the men whom you identified at the trial as the robbers? (pause)

Mrs. D'Amora: At court.

The Court: What was that?

Mrs. D'Amora: At the court.

The Court: All right. That was at the court, you mean in the courthouse?

Mrs. D'Amora: In the courthouse.

The Court: Where did you first see these men in person?

Mrs. D'Amora: At the courthouse.

The Court: Describe the men as they appeared at the time.

Mrs. D'Amora: (pause)

The Court: You cannot do so at this time?

Mrs. D'Amora: I cannot do so at this time, Your Honor.

The Court: It was too long ago, you are saying?

Mrs. D'Amora: That's right.

The Court: Did any law enforcement officer or representative of the District Attorney's office indicate to you who these men were?

Mrs. D'Amora: No, sir.

The Court: Did you read newspaper articles about the arrest of the defendants published on the day after arrest?

Mrs. D'Amora: I read articles in the newspaper, I don't know if it was the day after, but I did read articles in the newspaper.

The Court: Do you recognize the articles in Exhibit A?

Mrs. D'Amora: I recognize the two articles in Exhibit A, but there's three, I do not recognize the other one.

The Court: Were any of the articles in Exhibit A ever posted on a bulletin board in the State Laundry?

Mrs. D'Amora: Not to my knowledge.

The Court: If so, when were the articles posted?

Mrs. D'Amora: Not at all, to my knowledge.

The Court: Do you feel that your memory of the crime and subsequent events related to it, is as clear today it was at the time of the trial?

Mrs. D'Amora: No, I don't.

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The Court: This Court has now propounded to Marguerite D'Amora the thirty-eight questions in the Interrogatories, and these answers are true, to the best of your knowledge and belief?

Mrs. D'Amora: Yes, Your Honor.

The Court: All right. Thank you very much.

Transcribed April 14, 1972.

Certified to be a true transcript of the recorded deposition of Marguerite D'Amora in accordance with the Notice filed March 21, 1972.

GILBERT R. SWINK

Gilbert R. Swink
U. S. Magistrate